without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are *universal* in their application, to all persons within the territorial jurisdiction without regard to any difference of *race, color,* or of *nationality;* and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes, that, 'All persons within the jurisdiction of the United States shall have the right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of *every citizen* of the United States *equally* with those of the strangers and *aliens* who now invoke the jurisdiction of the court."

In the case of *American Sugar Refining Company vs. Louisiana,* 179 U. S. 89, 92, this Court said:

"The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, *race, nativity,* religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as tax payers, such

exemption would be pure favoritism and a denial of the equal protection of the laws to the less favored classes."

In the case of *Truax vs. Raich,* 239 U. S. 33, 39, this Court said:

> "Being lawfully an inhabitant of Arizona, the complainant is entitled under the 14th Amendment to the equal protection of its laws. The description, 'any person within its jurisdiction' as has frequently been held, includes aliens. 'These provision,' said the court in *Yick Wo vs. Hopkins,* 118 U. S. 356, 369 (referring to the due process and equal protection clauses of the Amendment) 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.' "

In *State vs. Montgomery,* 94 Me. 192, the court held unconstitutional an act requiring all peddlers to secure a license, and denying a license to an alien, and in so doing said:

> "Nor can this discrimination be sustained as a constitutional exercise of the police power of the state. It must be noted that the discrimination is not against a class, as criminals, as paupers, as intemperates and disqualified by character or habits, or as harmful to society, but as against a class solely as aliens. Such a discrimination is forbidden."

In *Templar vs. Board,* 131 Mich. 254, the court held unconstitutional an act which required barbers to take out a license, but which denied a license to aliens. In its opinion the court said:

> "But had it (the Board) the right to require citizenship? If it had the right to couple that with other requirements, it would have the right to make that the only requirement."

In *re Opinion of Justices,* 207 Mass. 601, the legislature submitted to the court the following inquiry:

> "If the legislature is of the opinion that public order, decency, and morality require that girls and young women be excluded from Chinese restaurants and hotels, is it within the constitutional power of the legislature to enact a law making it a criminal offense for any woman under the age of 21 years to enter a hotel or restaurant conducted by Chinese or to be served with food or drink therein, or for the proprietor of any such hotel or restaurant to admit thereto a woman under the age of 21 years or to serve her with food or drink therein?"

The court quoted from *Powell v. Pennsylvania,* 127 U. S. 678; *Yick Wo vs. Hopkins,* 118 U. S. 356, and *Barbier vs. Connolly,* 113 U. S. 27, and cited with approval *re Tiburico Parrott,* 6 Sawy., 349, 1 Fed. 481, and *re Lee Sing,* 45 Fed. 359, and then said:

"The business of keeping a hotel or restaurant to which the proposed legislation relates, is a necessary and proper kind of business that is entitled to the protection of the laws. It may be conducted legally or illegally, by a person of any nationality. The proposed law, without reference to the way in which it is conducted, puts a restraint upon it which might be expected very seriously to interfere with the successful management of it, whenever it is carried on by any person of a particular nationality, which is not put upon it when it is carried on by any person of any other race and nationality. By the strict terms of the proposed law it would be criminal offense for a Chinese proprietor of a hotel or restaurant to permit his wife, if she were under the age of 21 years, or his grown-up daughter of less than that age, to enter his hotel or restaurant, or to be served food or drink therein. This is a very great interference with the liberty of the subjects of a foreign ruler, lawfully residing within the jurisdiction of this state. It is a harmful discrimination against persons of the proscribed class, founded wholly upon their race and nationality, and it plainly falls within the constitutional prohibition quoted above. It subjects Chinese to an oppressive burden that deprives them of liberty which others enjoy and interferes with their right to carry on business acquire property and earn a livelihood, and denies them the protection of equal law.

"The only question that can be regarded as doubtful by anybody is that which arises on the supposition that the Legislature may be 'of the opinion that public order, decency and morality requires that girls and young women be excluded from Chinese restaurants and ho-

tels.' This brings us to the consideration of the police power. There is no doubt of the right and duty of the Legislature to enact laws for the promotion of public order, decency and morality. But when such legislation interferes with the exercise of personal rights, it must be directed to the prevention of real evils, in the interest of morality. The proposed legislation does not assume to forbid anything that is necessarily evil in itself, or to deal directly with any offense against order, decency or morality. There are good hotels and bad hotels, good restaurants and bad restaurants, kept by men of the Caucasian race, and there are others of both kinds kept by men of other races. The legislation does not refer to the character of the hotel or restaurant that a young woman may not enter, but refers only to the nationality of the person who conducts it. The enactment of such legislation is not a proper exercise of the police power. It has no direct relation to the evil to be remedied. It forbids the entry of a young woman into the hotel or restaurant of a Chinese proprietor, even if it is a model of orderly and moral management, and it permits the entry of a young woman into a hotel or restaurant kept by an American, which it is known to be maintained in part for the promotion of immoral or criminal practices. The classification of hotels and restaurants into those that are open to young women and those that are closed to young women is not founded upon a difference that has any just or proper relation to the professed purpose of the classification. The only classification is into hotels and restaurants kept by Chinese and those kept by persons of other nationality.

"In reference to classifications made in an attempted exercise of the police power, Mr. Justice Brewer said, in *Gulf, Colorado & Santa Fe Railway vs. Ellis*, 165 U. S. 150, 165, 'It is apparent, that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is based upon some reasonable ground —some difference which bears a just and reasonable relation to the attempted classification—and is not a mere arbitrary selection.' See also opinion by Mr. Justice Field in *Ho Ah ow vs. Hunan*, 5 Sawy. 552, Fed. Cas. No. 6, 546.

"The fact that a man is white, or black, or yellow is not a just constitutional ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of different color.

"We answer the question in the negative."

In the case of *Commonwealth vs. Titcomb*, 229 Mass. 14, the court said:

"It (the legislature) cannot proscribe one class upon the basis of race."

In view of the foregoing authorities, it is submitted that, subject to the exceptions above mentioned, aliens are within the equal protection clause of the Fourteenth Amendment as fully as citizens, that legislation imposing burdens upon, or limiting rights of, aliens, because of alienage, is void, and that however broad the power of classification may

be, classification based upon citizenship as against alienage, or, upon alienage as against citizenship, is void.

Again, the plaintiff in error has the right to engage in business as a pawnbroker by the express terms of Section 1977 of the Revised Statutes of the United States, which reads as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Aliens are included within the foregoing statute.

Yick Wo vs. Hopkins, 118 U. S. 356, 369.

United States vs. Wong Kim Ark, 169 U. S. 648, 695.

Whitefield vs. Hanges, 222 Fed. 745.

Nothing said by this court in the case of *Terrace vs. Thompson*, decided November 12, 1923, is in conflict with the foregoing. It must be remembered that the question before the court in that case was the right of the state to prohibit aliens from owning or leasing real estate within the limits of the

state, and that general language in an opinion must be restrained to the particular facts before the court.

Cohen vs. Virginia, 6 Wheat, 264, 399.

United States vs. Wong Kim Ark, 169 U. S. 649, 678.

Reinman vs. Little Rock, 237 U. S. 171, 179.

Bailey vs. Baker Ice Machine Co., 239 U. S. 272.

Speaking of the right of the City Council to grant a pawnbroker's license to a citizen and deny one to an alien, the learned Judge, speaking for the Supreme Court of Washington, said:

> "This question has also been before numerous courts, which have held that such distinction may properly be made for the reason that, being a privilege, it is liable to abuse, resulting in public harm, and may therefore, properly be confined to such persons as may reasonably be supposed to have a full sense of responsibility to the country and desire for its welfare, and persons who are attached to the principles of the government and well disposed to its good order and happiness. The legislative department of the government having determined this matter, the courts will not interfere with its conclusion." (Rec. p. 38.)

The foregoing is a statement to the effect that the City Council may assume, without more, that aliens cannot be and are not attached to the principles of this government and well disposed to its

good order and happiness, and that they have no full sense of responsibility to this country, and do not desire its welfare and hence classification on the basis of alienage is upheld. This then follows: The legislature, having the power to require a license as a condition precedent to engage in any and every kind of business, may arbitrarily refuse to issue such license to any and every alien, merely because he is an alien. There is no escape from this obvious conclusion. Therefore, the equal protection afforded to aliens by the Fourteenth Amendment and the rights guaranteed to them by Section 1977 of the Revised Statutes of the United States each is a myth. We apprehend that the asserted power to deny to aliens within the jurisdiction of the United States the rights guaranteed to them by the Fourteenth Amendment will not be acquieced in by this Court.

In *Cummings vs. Missouri*, 4 Wall., 327, this Court said:

> "To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition."

Of course, a Japanese cannot be admitted to citizenship. Therefore, the ordinance makes the

right dependent upon an impossible condition, and the right is denied to the plaintiff in error under any condition and the plaintiff in error, whatever his character, whatever his honesty, whatever his integrity, whatever his respect for American institutions and laws cannot secure a license, because of a classification based wholly on alienage, and which affords no ground for determining the presence or absence of those characteristics which justify the City Council in denying a license. The vice of this ordinance is found in the fact that, under the guise of the police power which justifies the City in prohibiting dishonest men from engaging in the business and prohibiting dishonest practices therein by dishonest men who may secure a license, an arbitrary rule is enacted which does not even approximate a practical method of determining the facts which are lawfully reposed in the City Council.

Game and fish are the property of the state, are within the plenary power of the legislature, and their killing or taking may be prohibited to all persons who are not citizens of the state.

McCready vs. Virginia, 94 U. S. 395.
Geer vs. Connecticut, 161 U. S. 519.
Manchester vs. Massachusetts, 139 U. S. 240.
Ex rel Silz vs. Hesterberg, 211 U. S. 31.
Patsone vs. Pennsylvania, 232 U. S. 138.

Therefore, if, with respect to that common property of the state, the legislature may not, consistent with the equal protection clause of the Fourteenth Amendment, prohibit a taking by resident aliens while permitting it by citizens, there can be no escape from the conclusion that the legislature, when dealing not with its own property, but with property rights of the inhabitants of the state, cannot discriminate against aliens in favor of citizens.

In *re Ah Chong*, 6 Sawy. 45, 2 Fed. 733, Judge Sawyer held in violation of the equal protection clause of the Fourteenth Amendment, and the Treaty with China, a statute of California prohibiting all aliens *incapable of becoming electors of the state* from fishing in the waters of the state. In his opinion, that eminent Justice said:

> "Citizens of other states having no property right which entitles them to fish against the will of the state *a fortiori*, the alien, from whatever country he may come has none whatever in the waters or the fisheries of the state. Like other privileges he enjoys as an alien by permission of the state, he can only enjoy so much as the state vouchsafes to yield to him as a special privilege. To him it is not a property right, but, in the strictest sense, a privilege or favor. To exclude the Chinaman from fishing in the waters of the state, therefore, while the Germans, Italians, Englishmen, and Irishmen, who otherwise stand upon the same footing, are

permitted to fish *ad libitum* without price, charge, let or hindrance, is to prevent him from enjoying the same privileges as are 'enjoyed by the citizens or subjects of the most favored nations,' and to punish him criminally for fishing in the waters of the state, while all aliens of the Caucasian race are permitted to fish freely in the same waters with impunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions 'as are enjoyed by the citizens or subjects of the most favored nation.' And such discriminations are in violation of Articles V and VI of the Treaty with China cited in full in Parrot's case. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privileges it must permit all others to enjoy upon like terms, the same privileges, whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation.

"The Fourteenth Amendment of the national constitution provides that 'no state shall * * * deny to *any person* within its jurisdiction the equal protection of the laws.' To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains and penalties than those to which others are subjected and it is to deny to them the equal protection of the laws, contrary to those provisions of the constitution."

The foregoing case has been cited with approval in the following cases:

County of San Mateo vs. Southern Pacific Ry. Co., 15 Fed. 722.

United States vs. Balsara, 180 Fed. 694.

Re Takai Maru, 190 Fed. 45.

Raich vs. Truax, 219 Fed. 273.

Tragesser vs. Gray, 73 Md. 251.

Commonwealth vs. Cosick, 36 Pa. County Court Reports, 637.

In the case of *Harper vs. Galloway*, 58 Fla. 255, the court held in violation of the equal protection clause an act of Florida requiring residents of the state who were not residents of Marion County therein to give notice of an intention to hunt, and the payment of a special license tax for the privilege of hunting in Marion County, but requiring no notice or license tax from residents of Marion County, and in so doing said:

> "The unjust discrimination against residents of other counties in the state who have rights as to the game in the state as imposed by Section 8 of the Act, is in effect a denial to the residents of the state who are not residents of Marion County, the equal protection of the laws of the land and such Section 8 is inoperative as to residents of this state."

In the case of *State vs. Savage,* 96 Ore. 53, the Supreme Court of Oregon held two acts of the legislature of that state, prohibiting the taking of salt water crabs from Coos County for the purpose of sale, and making it inapplicable to those engaged in the canning business, to be discriminatory class legislation and void under Article 1, Section 20, of the State Constitution, reading as follows:

> "No law shall be passed granting to any citizen or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

In its opinion the court said:

> "No good reason is suggested or can be conceived that in the protection of fish a portion of the people should be subject to prosecution and punishment for the catching or transportation for mercantile purposes of salt-water crabs taken in Coos County, while another class of persons operating canneries should have the exclusive right of taking and shipping the same kind of fish beyond the limits of the country for the purposes of sale. The act of 1915 and that of 1917 clearly grants a special privilege or monoply to those engaged in the cannery business without any good reason therefor, and is discriminatory class legislation and repugnant to Article I, Sec. 20, of the Constitution and void."

In *Poon vs. Miller* (Tex.), 234 S. W. 573, the court held invalid an act to secure a license to engage in the business of selling at wholesale fish and

oysters, and providing that no person could procure such license without swearing that he was a citizen of the United States or a naturalized alien. The action was by a Chinaman to enforce a provision in a contract made with him by the defendants to the effect that they would not engage in the fish and poultry business within certain territory for a certain time. One defense set up was that the plaintiff could not prevail because he had not secured and could not secure a license under the act in question. The court held against the defendants and said:

> "The state may have the power to regulate the sale of property belonging to the citizen or resident which has become a part of the commerce of the country, but cannot absolutely prohibit such sale in the face of the Federal Constitution, by an alien who has the same rights guaranteed to him as has the citizen. * * * *
>
> "We conclude that the provision of the statute denying this right to an alien to whom has been given all the rights of citizens of the most favored countries is in conflict with the treaty between the United States and China, and also is obnoxious to the provisions of the Fourteenth Amendment to the Constitution, and is of no force and effect."

Although there does not appear a direct statement that the Chinese whose rights were infringed

by the ordinance involved in *Yick Wo vs. Hopkins,* 118 U. S. 356, were all engaged in the hand laundry business as distinguished from steam laundry business, the opinion clearly indicates that to be the fact, and we submit that this Court will take judicial notice of that notorious fact. In that case this Court held invalid a discrimination against Chinese, although there can be no doubt that the state may prohibit the hand laundry business, because in *Quong Wing vs. Kirkendall,* 223 U. S. 59, 83, this Court upheld an act requiring the payment of a license to do hand laundry work, but none for the operation of a steam laundry. There Mr. Justice Holmes, speaking for the Court, said:

> "If the state sees fit to encourage steam laundries and discourage hand laundries, that is its own affair."

In *State ex rel Constantini vs. Darwin,* as State Fish Commissioner, 102 Wash. 402, an application for a writ of mandamus was made to compel the defendant to issue a fishing license for the year 1918. The relator was an Austrian, resident in the state since 1913, in which year he declared his intention to become a citizen of the United States. His application for such license had been denied by the Fish Commissioner, because of Section 5150-43 of Remington's Annotated Code, which provides:

> "No license for taking or catching salmon or other food or shell fish required by this act shall be issued to any person who is not a citizen of the United States of the age of eighteen years or over, unless such person had declared his intention to become a citizen and is and has been an actual resident of the state for one year immediately preceding the application for such license. * * * "

And also section 4362 of the 1916 Compiled Statutes of the United States, which provides:

> "No alien who is a native citizen or subject, or denizen of any country, state or sovereignty with which the United States is at war, at the time of his application, shall be admitted to become a citizen of the United States."

The court held that, despite the fact that the relator could not be admitted to citizenship, he was nevertheless entitled to his license.

From the foregoing it follows that even though the prohibition is with respect to a business which can be prohibited to aliens and citizens alike, a prohibition with respect thereto against aliens alone, or some aliens, is invalid, as in contravention of the equal protection clause.

The power of the Council, with respect to the business of a pawnbroker, is to enact such reasonable ordinances, with respect thereto, as will make it impossible for dishonest men to engage in the busi-

ness and as will prevent dishonest practices by any one engaged therein. The attempted classification found in the ordinance in question does not even tend to the accomplishment of that purpose. Even the counsel for the defendants in error will not assert that among the proscribed class are not to be found many individuals who have the same respect for the American institutions and the American government as have citizens of the United States, nor that any alien, whatever his respect for American institutions, whatever his honesty or integrity, may under any circumstances engage in business as a pawnbroker. In other words, under the guise of the police power, the City Council has merely attempted, by arbitrary and oppressive means, to serve an ulterior purpose, namely, to make it impossible for any Japanese to engage in business in the City as a pawnbroker.

The action of the City Council is condemned by the decision of this Court in *American Sugar Refining Company vs. Louisiana,* 179 U. S. 98, where this Court said:

> "The Act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle is valid. Of course, if such discrimniation were purely ar-

bitrary, oppressive, or capricious, and made to depend upon difference of color, *race, nativity,* religious opinion, political affiliation, or other consideration having no possible connection with the duties of citizens as tax payers, such exemption would be pure favoritism and a denial of the equal protection of the laws to the less favored classes."

The ordinance in question is likewise invalid, because of the constitutional right of the plaintiff in error to work for a living at any of the common occupations of the community. This right is a part of the freedom which it was the purpose of the Fourteenth Amendment to secure.

Barbier vs. Connoly, 113 U. S. 27, 31.
Powell vs. Pennsylvania, 127 U. S. 678, 699.
Allgeyer vs. Louisiana, 165 U. S. 578, 579.
Yick Wo vs. Hopkins, 118 U. S. 356, 370.
Coppage vs. Kansas, 236 U. S. 1, 14, 19.
Truax vs. Raich, 239 U. S. 33, 41.
Terrace vs. Thompson, Decided Nov. 12, 1923.

It cannot be disputed that engaging in business as a pawnbroker is one of the common occupations followed throughout the United States, and it is confidently submitted that if this ordinance is constitutional, the protection afforded aliens lawfully within a state is confined to the right to engage in physical labor.

THE TREATY BETWEEN THE UNITED STATES AND EMPIRE OF JAPAN DOES NOT PERMIT OF THE REFUSAL OF THE CITY TO GRANT THE PLAINTIFF IN ERROR THE LICENSE IN QUESTION.

The provisions of the treaty which require consideration are the following: (U. S. Stats. at Large, Vol. 37, pp. 1504-1509):

"The President of the United States of America and his Majesty, the Emperor of Japan, being desirous *to strengthen the relations of amity and good understanding which happily exist between the two nations*, and believing that the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries will contribute to the realization of *this most desirable result*, have resolved to conclude a treaty of commerce and navigation *for that purpose*."

"ARTICLE I.

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease

land for residential and commercial purposes and, generally, to do anything incident to or necessary for trade, upon the same terms *as native citizens* or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxation other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive in the territories of the other the most constant protection and security for their persons and property and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

In the construction of treaties certain rules were early established and have always been adhered to.

> "Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. *Shanks vs. Dupont,* 3 Pet. 242. Such is the Federal rule in this court."
>
> *Hauenstein vs. Lynham,* 100 U. S. 483.

"It is a general principle of construction with respect to treaties that they shall be liberally construed so as to carry out the apparent intention of the party to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred."

De Geofry vs. Riggs, 133 U. S. 258, 271.

"We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention being operative upon both powers, and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. Taylor, International Law, Sec. 383. As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is, not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation

of our jurisprudence. It is said by Chancellor Kent in his Commentaries, Vol. 1, p. 174: 'Treaties of every kind * * * are to receive a fair and liberal interpretation according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules or construction and course of reasoning which we apply to the interpretation of private contracts.''

Tucker vs. Alexandroff, 183 U. S. 424, 437.

"Is it necessary in an enlightening age to say that mental reservations cannot be admitted into treaties? This is manifest since by the very nature of the treaty the parties are bound to express themselves in such a manner that they may mutually understand each other. There is scarcely an individual now to be found who would not be ashamed of building upon mental reservation. What can be the use of such an artifice unless to lull the opposite party into a false security under the vain appearance of a contract?"

Vattel's Law of Nations, p. 284.

On the same subject the Washington Court said in the case of *In re Stixrud's Estate*, 58 Wash. 339, 353, where it is said:

"'This construction of the terms of the Treaty finds additional support when we call to our aid the general rule of liberal construction applied by the courts, both state and federal, in such cases. In *Geofroy v. Riggs, supra, at page* 271, Justice Field said:

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public laws of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Haucnstein v. Lynham*, 100 U. S. 483, 487."

"See also, 28 *Am. & Eng. Ency. Law* (2d *ed.*) 490; *Devlin, Treaty Power*, Sec. 116, 125."

Japan, in entering into the treaty was entitled to understand that it prohibited an invidious discrimination against Japanese whereby they were singled out and subjected to penalties and disabilities to which citizens were not subjected when the discrimination was one which the diplomatic history of the United States shows the United States would not have permitted any state or nation to have made against a citizen of the United States.

In March, 1882, the American Legation at Madrid reported overtures by the Liberian Minister, resident at Madrid, looking to a concerted remon-

strance of the diplomatic representatives at that capital against a Spanish law or regulation prohibiting the landing of foreign negroes in Cuba unless on the condition of depositing one thousand dollars. The Department of State had never had a case presented where the rights of an American citizen became involved, but the Department of State advised the legation that if a case should be brought to its notice it would remonstrate against it "as imposing a race discrimination not foreseen by treaty or recognizable under the amended constitution." International Law Digest, Moore, Volume 4, Section 552.

In 1873 a controversy arose between the United States and Russia. A license had been refused to a Jewish American citizen in Russia. The United States took the position that an American citizen could not be discriminated against because of his religious belief. Mr. Fish, Secretary of State, commenting on Mr. Jewell's presentation of the case, remarked that the withholding of the license from Rosenstrauss "on account, as it is understood, of his being a Hebrew of foreign birth," seemed to be in direct violation of the treaty the purpose of which was to place all citizens of the United States in Russia "on the same footing as native Russians."

International Law Digest, Moore, Volume 4, Page 113.

It certainly was not within the contemplation of the parties to the treaty of 1911 that Japanese should be put on a lower footing than citizens.

In 1885 the United States had a controversy with Turkey in reference to a Hebrew American citizen. International Law Digest, Moore, Section 555, states:

> "In an instruction of August 29, 1885, to the American Minister at Constantinople the Department of State observed that the rights of American citizens in Turkey under treaties were to be measured in a certain degree by the rights conceded to other foreigners of the most favored nation and for this reason the Minister was to be 'careful to make no untenable demand *as of right*.' Friendship and comity, however, entitle the United States, said Mr. Bayard, 'to ask and expect that no race or class distinction shall be made as regards American citizens abroad.' "

In 1879 a question arose between the United States and Mexico concerning a law of Mexico of 1863, which provided that natural born and naturalized citizens of nations adjoining the Republic could not acquire public lands in the states bordering such nations. The United States took the position that a citizen of the United States was invidiously dis-

criminated against in contravention of the treaty between the United States and Mexico by the law of 1863.

A communication from the United States to Mexico contains the following language:

> "The discrimination in this respect between those citizens and other foreigners is still believed to be invidious, unnecessary, at variance with the treaty, and quite incompatible with those friendly relations which the obvious interest of both countries requires should be maintained between them * * * The Mexican law of 1863 is especially invidious towards citizens of our border states because it practically discriminates against them by name and thereby stigmatizes them as unworthy to have the privilege of holding the real estate. This stigma cannot be acquiesced in by this government which does not admit the right of any foreign power to discriminate between citizens of different states of this Union who can only be known abroad as citizens of the United States. It may be that the treaty of 1831 does not expressly confer upon citizens of the parties the right to hold real estate in their respective territories nor does it provide for an equality of rights in that respect between Mexicans and our own citizens. Although the equality between citizens of the United States and other foreigners in Mexico is by the second and third articles of the treaty literally restricted to matters of commerce and navigation, it may also fairly be construed to include a like equality in the privilege of acquiring and holding real estate.

"It cannot be doubted that if the construction now claimed had been anticipated it would have been thwarted by an explicit provision. There is believed to be no such discrimination against Mexican citizens in any law in this country." International Digest, Moore, Volume 6, Page 702.

The Mexican government did not yield to the protest of the United States. On the other hand the United States did not withdraw its protest. Was the United States acting in good faith in making its protest to Mexico? Certainly no American would for one moment contemplate the thought that the United States was trying to force a weaker power to yield to a view of the law which the United States believed was unfounded. It must be assumed that the United States in good faith believed that the Mexican law constituted an invidious discrimination against citizens of the United States. This controversy with Mexico arose long before the United States and Japan entered into the treaty of 1911. Was Japan justified or not in assuming that an invidious discrimination between Jepanese and citizens of the United States was not forbidden by the treaty, when the United States in its controversy with Mexico had taken the position that a very much less objectionable discrimination had been made by the Mexican law against citizens of the United States.

Certainly good faith would have required the United States to have notified Japan that it no longer believed that the protest which the United States had made to Mexico was well founded in law. It is certain that had the United States inserted in the Treaty with Japan a provision that Japanese might be discriminated against so that they would not, under the law of certain states of the United States, have the same privileges as citizens, the treaty would not have been entered into by Japan, and it is equally certain that if it had been contemplated by Japan that the treaty as written permitted such discrimination the treaty either would not have been made or else there would have been a provision inserted in its thwarting such interpretation.

After the Treaty of 1911 had been ratified by the respective countries, the President of the United States proclaimed its ratification in the following language:

> "Now, therefore, be it known, that I, William Howard Taft, President of the United States of America, have caused the said treaty as amended and the said understanding to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof."

As the opening of the Treaty states, it was entered into for the purpose of "strengthening the relations of amity and good understanding which happily existed between the two nations." It is inconceivable that the Treaty contemplated the right of a city to enact a law which might cause a breach of international relations between the two countries when the breach would be brought about by a city making a discrimination which was equally invidious as the discrimination which had been the cause of a protest by the United States to Mexico prior to the enactment of the Treaty of 1911.

Is it for one moment to be supposed that in the Treaty of 1911 the United States expected Japan to understand that it would be permissible for a city of one of the states of the Union to enact a law in the future which would impose upon Japanese subjects resident in such states a disability to engage in one of the common occupations which was not imposed upon citizens? If not, then the upholding of such a right on the part of the city would be to charge the United States with entertaining the thought of such a mental reservation.

The Supreme Court of Washington held that the business of pawnbroking was not carrying on trade and that the right to trade, granted in Article

I of the Treaty "means only the pursuits of those callings in which an individual has an inherent right to engage." We find ourselves unable to accept the proposition that the Treaty grants only inherent rights. If that were true then the Treaty would serve no purpose whatever. Therefore, it is necessary to determine the meaning of "trade" as used in the Treaty, and the meaning of "commercial purposes" likewise appearing in Article I of the Treaty. It is obvious that "leasing land for residential and commercial purposes" guaranteed in Article I of the Treaty, carries with it the right to engage in commercial business, as otherwise, the nationals of Japan would have the right to lease land for commercial purposes but not to engage in business after having so leased land.

The term trade is not generally given the limited meaning first above suggested. In Schooner Nymph, I Summ. (U. S.) 517, in interpreting the word trade as used in a statute declaring that if any licensed vessel or ship "shall be employed in any other trade than that for which she is licensed," she shall be forfeited, Storey, J., said:

> "The word 'trade' is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Whenever any occupa-

> tion, employment or business is carried on for the purpose of profit or gain or a livelihood, not in the liberal art or in the learned professions, it is constantly called a trade."

In that case codfishing was held to be a trade.

In the case of *State v. North,* 160, N. C. 1010, the court had under consideration the case of a statute authorizing taxation of trades, professions, franchises and incomes, and during the course of an opinion said trade comprehends,

> "Not only all who are engaged in buying and selling merchandise, but all whose occupation or business it is to manufacture and sell the products of their plants. It includes in this sense any employment, or business embarked in for gain or for profit."

In the case of *Smith v. Cooley,* 65 Cal. 46, the court held that the working of a mine under a bare mining right has uniformly been construed by the courts as a species of trade.

In *Chase National Bank v. Faurot,* 149 N. Y. 532, the court held that the bonds of a railroad company, payable to an individual or his assigns are commercial paper.

In *State vs. Phipps,* 50 Kan. 609, the Court, speaking of "trade" said:

> "In the broader sense it is any occupation or business carried on for subsistance or profit."

In the case of *State ex rel Denny v. Bridges,* 19 Wash., 44, the court said:

> "As asserted by counsel for plaintiff, the word 'commercial' is one of wide significance, and in its general sense may mean almost any transaction or intercourse, between men."

In *Spotswood v. Morris,* 12 Ida. 360, the court held that a commercial partnership is one which is engaged in trading in merchandise or in financial operations. It is readily apparent that the terms "trade" and "commerce" as used in Article I of the Treaty are terms of broad significance and when there is borne in mind the rule that if a treaty is susceptible of two constructions, one restrictive of rights that may be granted under it and the other liberal, the latter is to be preferred, it seems incontrovertable that the broader meaning must be given these terms.

The meaning of these terms were considered by the Superior Court of the State of California for the County of Los Angeles in the case of *State v. Tagami, et al,* instituted by the Attorney General of the State of California for the purpose of escheating a leasehold interest in real estate, the

lease being for the purpose of conducting a health resort or sanatorium. The case was heard on demurrer to the complaint and Judge Hewitt, on July 9, 1923, delivered an opinion in which he held that the term 'commercial purposes" included conducting a health resort or sanitarium. His opinion indicates such an extensive investigation on his part and is so well considered that we quote therefrom as follows:

"This brings us to the question at issue, namely, can a native and citizen of Japan, resident in California, lease, occupy and enjoy lands for the purpose of maintaining a health resort? The answer to this question depends upon the meaning of the words of the treaty wherein it permits a subject of Japan to lease land 'for residential and commercial purposes' in the United States and vice versa.

"The word 'commerce' occurs several times in this Treaty, as in Article 11 where it is provided that 'premises—used for purposes of residence or commerce shall be respected'; again in Article IV where it is stipulated that there shall be, between the territories (of the contracting powers) 'reciprocal freedom of commerce and navigation.' In Article XIV where the 'most favored nation clause' occurs, we read that 'in all that concerns commerce and navigation' any privilege or immunity granted to the citizens of any other state shall extend to the citizens of each contracting party reciprocally. The derivative 'commercial' is found twice in the Treaty, once in Article I as hereinbefore quoted, and again in Article VII where it is provided and 'commercial, industrial and finan-

cial' companies and associations shall have authority to exercise the rights therein specified.

"Plaintiff's counsel contend that 'when the word 'commercial' is used in Article I of the Treaty, giving to the nationals of the two countries the right to 'lease lands for residential and commercial purposes' shall be regarded as dealing with 'commerce' in its elementary sense of trade and barter in goods, wares and merchandise, either wholesale or retail.

"In support of this view, our attention is invited to the fact that Article I of this Treaty as first proposed by the Japanese negotiators underwent an important change in the United States Senate. In the original draft of this Treaty Article I recited among other things that the citizens and subjects of each state residing in the territories of the other should 'be permitted to own or hire and occupy the houses, manufactories, warehouses, shops and premises which may be necessary for them, and to lease land for residential, commercial, industrial, manufacturing and other lawful purposes." As revised in the Senate, and as contained in the ratified Treaty, the clause was modified, and, as it now reads, it grants liberty to the nationals of the respective powers to 'own or lease and occupy houses, manufactories, warehouses and shops, to lease land for residential and commercial purposes.' etc. That there is here a very material change is manifest, and it was the subject of discussion in diplomatic correspondence in 1913 between Mr. Bryan, then the American Secretary of State and the Japanese Ambassador at Washington, about the time the first California Alien Land Law was pending in the state Legislature. The former, in his letter to the latter (dated July 16, 1913) referred to this particular matter and said: 'It thus ap-

pears that the reciprocal right to lease land was confined to residential and commercial purposes, and that the phrases 'industrial' and 'other lawful,' which would have included the leasing of *Agricultural lands,* were omitted.' As to the exclusion of the leasing of lands for agricultural purposes, the effect of these verbal changes is clear. Does it also follow that the omission of the phrases referred to has also excluded occupations like that here under consideration, which it is arguable, were just as clearly permitted under the original draft? If so, a long and very interesting list of occupations and enterprises are banned by the Treaty, although we are here concerned with but one. It is therefore well to take note of the implications involved, in a proper decision of the questions here presented. The statement was made in argument, and of the fact the court will take note, the Japanese are engaging in many occupations and professions that do not fall within our conception of trade or barter, or the exchange of goods as implied in the elemental or primary meaning of the word 'commerce.' They conduct lodging houses, their priests of religion maintain 'temples for Buddhist Worship.' They operate pool rooms and other places of amusement, and practice medicine, surgery and dentistry, and operate employment agencies. Their interpreters certainly interpret in our courts but if they lease offices where they make engagements for their services with signs posted on their doors, their right so to do is open to question. This list is not exhaustive, but none of the things mentioned pertain to the carrying on of trade, wholesale or retail.' Nor do they involve the 'sale of goods, wares or merchandise.' Was it really intended to exclude Japanese from engaging in such occupations or callings as here suggested? Yet it must be conceded, if a close and strictly etymological definition of the

words 'commerce' and 'commercial' used in Treaty and as ordinarily employed in the English language is to be followed, such a conclusion would logically follow.

"It is important, therefore, to determine, if we can, what is meant by the language of the treaty which permits citizens of Japan (aliens ineligible to citizenship) 'to lease lands for residential and commercial purposes.' At the outset, the word 'commerce' as has so often been said, is a 'term of the largest import.' As used in the Constitution of the United States, the word 'commerce' has been defined on many occasions by the Federal Courts, beginning with the famous decision in *Gibbons vs. Ogden* rendered by Chief Justice Marshall. There it was said that 'commerce, undoubtedly is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, and among the several states and with the Indian Tribes,' including the power to regulate navigation. Further, the opinion proceeds: 'The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter.' 9 Weaton U. S. 188.

"No useful purpose would be served by quoting from subsequent decisions—when this broad definition has been repeated and applied in particular cases and under the many varying circumstances that have come before the courts. But we can discern from the beginning that 'commerce' as used in the Federal constitution includes all the instruments and agencies by which it is carried on. As illustrative of the definition of 'commerce' as

there used, in line with the first declaration above quoted, and typical of all decisions to which my attention has been directed, we need only refer to one, where it has held that a newspaper is a subject of 'commercial intercourse.' (*Preston vs. Finley*, 78 Fed. 850.)

'Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of this country and the citizens or subjects of a foreign country, and between citizens of the different states. It is said that commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in those terms navigation and the transportation of persons and property, as well as the purchase, sale and exchange of commodities. Commerce is undoubtedly traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all it branches, and is regulated by prescribed rules.'

"But of more recent years, as life and society have become vastly more complex on one side and specialized on the other than in former times, we note a tendency to enlarge the definition of 'commerce' in judicial decisions. For example:

'Commerce in its simplest signification means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care and various mediums of exchange become commodies, and enter into commerce. The subject, the vehicle, the agent, and the various operations become the object of commercial regulation.'

Riverside Mills vs. Atlantic Coast Line R. Co., 168 Fed. 987.

See also *Northern Securities Co. vs. United States*, 193 U. S. 197.

"So much for 'commerce' in the constitutional sense, as we ourselves use the term when dealing with the subject of Federal and state regulations of commerce. 'Commercial,' the derivative of commerce, means primarily anything of or pertaining to commerce. The pharse 'commercial corporations' occurs here and there in our laws, and a case which may be referred to as having a certain value for purposes of definition, is found in 193 Fed. Reports. There it was held that a corporation engaged in leasing its own property and collecting rents therefrom is a moneyed, business or commercial corporation, within the meaning of the Federal Bankruptcy Laws.

In *re Radke Co.*, 193 Red. 735.

"I quite agree with counsel for plaintiff when they argue that the question here to be determined is the sense in which the framers of the Treaty used the words 'residential and commercial purposes' and what they had in mind, as evidenced by a fair and reasonable construction of the term they employed to express their intentions.

"Granting that this Treaty is essentially a Treaty of commerce and nagivation, it does not necessarily follow that it is exclusively such. Nor is it also a necessary conclusion that its words, where they mention commerce and commercial purposes, are to be taken exclusively in the 'elemental' or primary sense as signifying traffic in goods, wares or merchandise, and that only. The rules applied generally to the interpretation of treaties, as announced by our Federal courts, where such questions more

commonly arise, and likewise by writers on international law, alike unite to caution us against a too rigid construction of the terms of a treaty, unless the narrow rather than the liberal meaning is clearly indicated.

"By the terms of the first paragraph of Article I, Japanese subjects in the United States may do the following things: (1) they may carry on trade, wholesale and retail; (2) they may own or lease and occupy houses, manufactories, warehouses and shops: (3) they may employ agents of their choice; (4) they may lease land for residential and commercial purposes; (5) and they may generally do anything incident to or necessary for trade. Of course all these matters are reciprocal, and Americans residing in Japan may do the same things there. As plaintiff would construe those provisions, they would mean that Japanese may here only carry on wholesale and retail trade or traffic in goods, wares and merchandise, and for that purpose they may lease and occupy houses in which to live, and factories, shops and warehouses, together with only such lands as may be necessary or convenient for living, and the making, storage and sale of the articles in which they deal. That such a conclusion is literally possible may be admitted, but if it does violence to the real purposes of the Treaty, otherwise reasonably obvious, and works an unnecessary restriction on the Japanese residing here, as well as Americans residing in Japan, apparently not specifically contemplated by the authors of the Treaty, the disposition of the courts would be to examine a little closer into the purposes of the Treaty in the light of the attending circumstances, so far as they may be reasonably shown or inferred. All the more would this be the case where the literal or close construction deprives the nationals of one country residing in the other of some

privilege from which if denied, the citizens thereof can reap no tangible advantage at best, and which construction too requires us to say that both countries have intentionally and mutually imposed a restriction on the privileges of their own citizens residing in the other which they cannot reasonably be said to have contemplated in the nature of the case.

"But from my examination of this Treaty, I am not prepared to say that the strictly literal interpretation above referred to is the only one that should be permitted. It seems to me these several things which Japanese residing here, and Americans residing in Japan, may do are distributively stated in the Treaty as separate things, so far as their relation to each other is concerned, and are not to be regarded as merely and only different parts or phrases of one and the same thing namely, the buying and selling of goods, wares and merchandise; when Article I of the Treaty gives Japanese the right to own or lease and occupy houses, factories, warehouses and shops, and to lease land for residential and commercial purposes, it would seem to me that the phrase 'commercial purposes' is a somewhat broader and more general phrase than 'to carry on trade' in the sense of dealing in merchandise only.

"I am not unmindful of the fact that our courts and text writers have enunciated certain rules for the construction of treaties.

"In *Geofry vs. Riggs*, 133 U. S. 258 (271), Mr. Justice Field made a declaration to the effect that in the construction of treaties, 'Words are to be used in their ordinary meaning, as understood by the public law of nations, and not in any artificial or special sense imposed upon them by local law, unless such restricted sense is clearly intended.'

"Professor Hyde in his recent work in International Law (Sec. 531) says:

> 'The ascertaining of the sense in which terms have been employed in a treaty involves a search for sources of information. Those may be found in what is intrinsic to the agreement. The use of whatever sheds light on the question involved is not restricted by prohibitive rules such as those in which the common law abounds. As Professor Westlake has well said, 'The important point is to get at the real intention of parties, and that inquiry is not to be shackled by any rule of interpretation which may exist in any particular national jurisprudence, that is not generally accepted by the civilized world.'

"Another authority, Wigmore on Evidences, thus expresses the principle of treaty interpretation:

> 'Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore all the circumstances must be considered which go to make clear the sense of the words——that is, their association with things.'

Wigmore on Evidence IV. p. 3470.

"In summing up his discussion of the so-called 'rules of construction of treaties,' Professor Hyde gives expression to the following statements (Sec. 533):

> 'That the courts of a contracting state, such as those of the United States, not on the assumption that it was the design of the contracting parties not to contravene principles of morality and fairness, and not to provide

the means for perpetrating or protecting frauds, that their agreement should be interpreted in a spirit of the utmost good faith, and in a manner to carry out its manifest purpose, and that its terms should be liberally construed, manifests simply an imputation of good faith and high purpose to the executive branch of the government and to that of other contracting powers. It is recognition of the only intelligible theory in which enlightened states could be deemed to conclude treaties with each other.

'The court may wisely hesitate to indulge in the presumption that the terms of a treaty were given a significance such as to entail a peculiar sacrifice by one party, and involving undertakings beyond the requirements of international law. Such reluctance indicates, however, nothing more than a demand for convincing proof that those terms were used in such a sense. It does not imply any denial of the right of the parties to so agree; nor does it concern the nature of the evidence which may be competent to establish the fact. Such a judicial attitude may be regarded as more salutary than one evincing readiness to presume that the contracting parties did not attach to the terms of the treaty a significance which they might not unreasonably have adopted.'

"Once more from Justice Field:

'It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.'

(*Geofry vs. Riggs,* supra.)

"A brief, but comprehensive, summary of the attitude of the United States Supreme Court toward the construction of the treaties is thus expressed:

> 'It is a general principle of construction, with respect to treaties, that they shall be liberally construed, so as to carry out the apparent intention of the parties, to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this Court that when a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."

Hauenstein vs. Lynham, 100 U. S. 483.

"Counsel for the state, in their oral argument and brief, have made an analysis of this treaty and therefrom they conclude that such resume 'clearly shows that judging from its context, the framers thereof had in mind actual trade, such as is conducted in shops, factories, etc. The purpose was to facilitate trade and shipping between the two countries and to permit the occupation of lands by the 'nationals' of each of the two countries in the territories of the other only to the extent that it was necessary to carry on such trade.'

"That the Treaty does indeed subserve the purpose here stated will be conceded, but while it does that, it does something more. Herein lies a distinction not unlike that which we have above

observed between the definitions of commerce as comprising in goods and business intercourse as well.

"But there is another deduction to be drawn from a reading of this Treaty, which to my mind indicates that it is not confined to actual trade only, and rights incidental thereto exclusively. An examination of the Treaty provisions will show that it deals with rights of two quite distinct and severable classes, namely: first, the personal rights of the citizens of each country residing in other, which may be generally described as rights of aliens as individuals, and secondly, the regulations of trade, commerce and navigation and the rights pertaining thereto. In support of this view, it may suffice to state that under the terms of the treaty, the citizens of either country may enter, live and travel in the other, own houses and lease lands for residential purposes; they shall enjoy complete equality of taxes with native citizens; they are entitled to the most constant protection and security of their persons and property; they are exempt from military and naval service; their dwellings, factories and shops, and the premises pertaining thereto, shall be respected; they are entitled to the protection of the safe-guards of the local laws in the matter of domiciliary visitation and search under legal process; they have the same protection with regard to patents, trademarks and designs as our own subjects enjoy. On the other hand, the treaty deals with another class of regulations of a purely commercial or mercantile character; wherein it treats of Consular officers and their credentials, the freedom of commerce and navigation, the regulation of import and export duties, the exemption from transit duties, the right of limited liability companies, the privileges of vessels in the postal service, the discharge of cargoes of vessels at ports, and the like.

"I cannot, therefore, bring myself to the conclusion that the treaty is *purely* a *commercial* treaty in the narrow or strict sense. It is indeed that, but it is much more, as the above general reference to some of the subjects with which it deals ought to make manifest. The regulations of the status of the Japanese as residents in this country and of Americans as residents in Japan is as clearly one of the purposes of this treaty as its office in prescribing the rules that shall govern commercial intercourse between the two nations whose representatives signed it. Let it not be overlooked that the two aspects of the treaty are mutually exclusive at all points, for in serving its two-fold purpose it is not divided into articles that are separated from each other, like water-tight compartments. With respect to the particular point here under consideration, namely, what things the Japanese may do and what they may not do in this country, partakes of the nature of both aspects of the Treaty. The very act of limiting their business or economic activity is to that extent a limitation upon their status or rights as persons residing in the community.

"For the most part, the public and judicial discussions heretofore of the Japanese Treaty and the California Alien Land Laws have been concerned with the leasing of agricultural land in the raising of products of the soil. But no such question is even remotely involved in this case.

"As we have seen, if the phrase 'commercial purposes' appearing in the treaty must be construed in the same manner as 'Commerce' is defined in our Federal constitution and laws, and if the Treaty itself, as an entirety, is to be regarded as a treaty of Commerce and Navigation only and construed in that light alone, there is plausible ground to hold that 'commercial purposes' means

only purposes relating to trade in goods, and the agencies and instruments by which it is carried on. And the same is doubtless true, if we are under the necessity of construing 'commerce' as it is defined in the dictionaries of our language, but there were two parties to the treaty of diverse race and speech and it represents the contract both parties made to cover a present situation and to provide for future conditions affecting persons belonging to these dissimilar races. Looking at the problem from the common standpoint of both the United States and Japan, each was concerned about the safety and with the rights and well-being of its own citizens residing in the territories of the other, within certain limitations of course, but in terms of perfect equality, quite as much as with establishing rules under which commerce and navigation between the two countries should be carried on. Likewise, each country, in so doing, was necessarily considering what rights and privileges it was willing to extend to the 'nationals' of the other residing in its own territories.

"The balance between these two considerations, is the resultant as expressed in the treaty. There were and are Americans in Japan, just as there were and are Japanese residing in the United States. We are not concerned with any question of immigration here, nor with the relative numbers of the citizens of either country residing in the other; but only in determining, if we may, what the treaty negotiators of both countries meant when they stipulated that the citizens of either residing in the other might lease lands for residential, and particularly, commercial purposes.

'I am not aware of any definition of commerce, or commercial purposes laid down in our law books, or contained in the dictionaries of the English lan-

guage that includes the rendering of personal or professional services for a consideration as being within their meaning. Certainly these terms, as ordinarily applied by us, do not include such services.

"Tested by the hard and fast definition of commerce commonly accepted among our own people, the lawyer, dentist, surgeon, physician, priest, or pastor, teacher, interpreter, engineer, or indeed any professional man, in following his calling, is not engaged in commerce; and his office or dwelling is not owned or leased for a 'commercial purpose.' Neither is such a person carrying on 'trade, wholesale or retail,' nor is his office a 'factory, warehouse or shop.'

"By the same token, the barber, the cobbler who repairs but does not sell shoes, the bootblack who shines, but does not sell brushes or polishes, the proprietor of a place of amusement or recreation, who provides a diversion, be it pool or billiards, a movie show, newspapers or books to read, but sells neither billiard balls, cinema films or books or papers, is not engaged in commerce. Likewise the Buddhist priest who performs the ministrations of that faith, either by religious service or teaching, or by the instruction of Japanese youth for a fee or contribution, is not engaged in commerce, and the premises where he so ministers, if leased or owned, is not so owned or leased for a commercial purpose. Yet again the lodging housekeeper, who lets rooms to guests for hire and thus provides a place for them to rest and sleep, sells no 'goods,' wares, or merchandise'—he himself carries on no wholesale nor retail *trade* in the ordinary sense of the term as we use it.

"A ready answer to all this might be that persons employed in all these various occupations, and others that might be named, are really engaged in

commerce because they sell their services, which, if it be a true answer, likewise answers the question here to be decided without further argument. But such an answer begs the question entirely and is equally at variance with the dictionary definition of commerce. There is indeed a certain school of political economists which holds to the theory that labor is a 'commodity' which may be brought and sold like any other, and that brain and brawn are the 'goods, wares and merchandise' (so to speak) which one hires or sells just as another sells collars or needles. I am not prepared to accept that dogma on general principles, for it is of the hardness of the coarsest materialism. But what of the teacher, priest, doctor, dentist, lawyer, interpreter and the rest of the professional catalogue? Are their services also a commodity of the class of goods, wares and mercandise to be sold and purchased the same as any other article of trade or commerce?

"These questions have occurred to me as I have considered this case, not for the purpose of indulging in refinements of casuistry, but to enable me to read, if I may, *in this Treaty*, the fair, reasonable and just meaning of its terms. Do they really mean that no Buddhist priest can perform a Japteach or contract to teach the language, or act or contract to act as an interpreter for a fee? Do they mean that no Japanese may operate a place of amusement or recreation where he sells nothing that the patron can carry away in his pocket or in a basket? Do they mean that no Japanese can conduct a lodging house for hire? Do they mean that no Buddhist Priest can perform a Japanese burial service for a contribution? Do they mean that no American professional man can do any of those things in Japan, and that no American clergyman can bury our dead there for any sort of compensation notwithstanding the payment of a

contribution for that sacred service is not unknown among us here at home, yet, we do not call that 'commerce.'

"I would rather say that in providing for the security, livelihood and well-being of our own 'nationals' in Japan, as well is the 'nationals' of Japan here residing, the framers of this Treaty, did not intend, nor should we here say they intended to deprive them of the right when sick and in ill health to be advised and prescribed for by physicians of their own race, to be attended by nurses of their own race, to be cared for in a place maintained by persons of their own race, and with other congenial surroundings, if they so desire. One wholesome way to look at a question of this sort is to turn it around and look at the other side. Suppose an American physician in Japan, finding the needs of such an institution in Tokyo or Kobe, should conceive the idea of establishing a sanitarium for the treatment of Americans in ill health sojourning in Japan. Suppose, further, the Japanese government, through its duly constituted officers of the law, should put him out of business declare his lease and 'all the appurtenances thereto belonging' forfeit to the Empire because this same Treaty was being violated—his place not being leased or occupied for a 'commercial purpose.' It would probably seem to us that the Japanese Government was stricking in the bark, and that it was doing violence to the spirit of the Treaty contract, while apparently zealously observing its technically correct letter. I am rather inclined to the belief that in drawing up this Treaty, its authors had no intention of excluding the citizens of either country who reside in the other from following any of the occupations herein mentioned, even though none of them, strictly considered, fall within any definition of engaging in 'commerce' tested by the

rigid standard of trade in goods, wares and merchandise.

"It must be apparent that, insofar as the decision to be made in this case now or hereafter by other tribunals of higher jurisdiction, turns upon the question of leasing or use of premises for 'commercial purposes' (ignoring 'residential purposes' for the moment), such decision will itself turn upon the point whether a strictly literal or liberal construction of this Treaty is to be adopted. As I understand it, one of the accepted methods sometimes resorted to in the interpretaion of a treaty is to compare it with previous treaties between the same countries, dealing with the same general subject matter. There was from 1894 to 1911 a Treaty of 'Commerce and Navigation' in force between the United States and Japan, which was superseded by the Treaty here involved. Among other things the former Treaty provided that the citizens of each country residing in the other 'shall have free access to the courts of Justice in pursuit and defense of their rights; they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects.' Again, the Treaty of 1894 provided that 'the citizens or subjects of each of the contracting parties shall enjoy in the territories of the other entire liberty of conscience, and subject to the laws, ordinances, and regulations, shall enjoy the right of private and public exercise of their worship, and also the right of burying their respective countrymen according to their religious customs, in such suitable and convenient places as may be established and maintained for that purpose.'

"Now, the fact is the Treaty of 1911 contains no such provisions as the two above quoted from the Treaty of 1894 at all. The present Treaty is entirely silent on the subject of resort to the courts for redress of wrongs or the protection of rights, and it says nothing about the exercise of worship, either public or private. Are we to deduce from this circumstance that the framers of the present Treaty really intended to deprive the nationals or each country residing in the other of such fundamental rights as these? Were the matter of sufficient importance, it might be interesting to know the reasons for these omissions from the Treaty of 1911. Probably the explanation is that such rights being so 'elemental,' it was considered that no country claiming to be civilized would deny them, and therefore that their retention in the compacts between these nations was superfluous. But, however that may be, the fact remains that these rights of resort to the courts and freedom of worship were omitted, intentionally we must assume, from the Treaty now in force. What rule of interpretation are we to apply to this situation—a strictly literal rule or a liberal one? Are we really to say, since this Treaty deals with 'commerce and navigation' only, and these words being used in the 'elemental sense,' that therefore, Japanese in America, and Americans in Japan, are not protected in the enjoyment of these rights by the Treaty, because forsooth the Treaty says nothing about them, and they have been dropped from a new Treaty which superseded a former Treaty which contained them. To answer such a question in the affirmative is simply unthinkable, for reasons which, in part at least, although obvious, would take us outside of a dry question of Treaty interpretation. The point I would make, however, is that in the particular just referred to, every con-

sideration of public policy and common sense requires that a liberal attitude towards this Treaty, as well as of others where our courts have construed them, should be taken. If this attitude is appropriate towards the Treaty as a whole, I see no good reason why it should not be taken with regard to its proper interpretation. And I would take it that this position is justified, as to the matters just referred to, notwithstanding that the right to the exercise of religious worship has naught to do with trade in goods, wares and merchandise, and resort to the courts may, but oftentimes does not. Surely a Japanese who is injured in an automobile accident by a fellow countryman, or perchance by a native citizen, if he sues in our courts for his personal injuries, is not resorting to them for a 'commercial purpose.'

"While reference has been made above to the keeper of a lodging or rooming house, it was there made only for the purpose of calling attention to the fact that a person so employed is not engaged in 'commerce' or 'trade' in the ordinary acceptation of the terms as we use them, and further, to the logical conclusion, if the Treaty is to be given a construction so close as contended for by the plaintiff, the Japanese lodging housekeeper can neither own nor lease his establishment here, nor can an American conduct a hotel, on the so-called 'European' plan in Yokohama. But those aliens ineligible to citizenship can, so the Treaty provides, lease land for *residential*, as well as commercial purposes. Looking at the lodging house or hotel keeper's occupation a little closer, however, the view is entirely permissible that people engaged in 'trade' and 'commerce' need places in which to rest and sleep, and, like other "strangers in a strange land' aliens are most apt, for a variety of

of obvious reasons, to seek such accommodations in places conducted by persons of their own nationality. No one should be heard to say that it is unlawful for the individual alien to rent and occupy an entire house for a residence, but that he cannot rent a room in a lodging house for a week, a month, or a year for 'residential purposes,' because, indeed, the person who conducts the lodging house is himself not engaged in 'commerce.' Such a proposition is unreasonable on its face. Rather should it be said that lodging houses, rooming houses, hotels, (we exclude hotels where meals are 'sold'), are really instrumentalities by which commerce is facilitated, even though indirectly, for the very good and sufficient reason that commerce cannot be conveniently carried on without them. But aside from that, the lodging housekeeper occupies his house himself, and lets rooms to others for residential purposes, and to hold othewise is futile.

"Let us carry this rooming or lodging house inquiry a little further. Aliens 'engaged in trade' do not always enjoy good health; like other people, they get sick, or need rest and recreation, and if not actually sick, persons so engaged oftentimes, like native citizens, are afflicted with impaired health. Hence, we have sanitariums—health resorts. Wherein does the occupation of the Japanese lodging housekeeper differ in any essential particular from that of the proprietor of the sanitarium? The latter provides and equips a place, let us say, favorable in location and with agreeable surroundings for accommodation of guests who are in ill health, furnishes them with rooms, supplies them with a pleasant environment for their betterment, with competent physicians to advise and prescribe for them, or with nurses to attend them, with improved grounds or other conveniences where they may

enjoy recreation, rest, or amusement—all this and possibly more. The proprietor of such a place is not engaged in commerce, as we have seen it defined, but he certainly does provide a place of residence, temporary though it be, for a certain class of persons who are in poor health and in need of just such a resort. I cannot believe otherwise but that, both as to the proprietor of such an establishment and as to his guests or patients, the leasing for the purpose of a health resort is essentially the leasing thereof for residential purposes even though other service is provided. If we concede, for the sake of the argument, that Japanese residing here can only be engaged in trade, or the actual buying and selling of goods, wares and merchandise, or in occupations incidental thereto, certainly the citizen of Japan who provides a 'residential' place for and therein takes care of his fellow 'nationals' who may be afflicted, physically or mentally, serves a very useful if not 'commercial' purpose in restoring them in mind and body so that they may pursue their several callings here allowed under the Treaty. So long as Japanese are permitted to come to our shores at all, which is a matter entirely outside of the question here presented, we should not and cannot deny them the privileges of health restoration at the hands of their fellow countrymen, no more than we can refuse them access to our courts or freedom of religious worship. On the ground, therefore, that the maintenance of a sanitarium is, in the last analysis, both a residential and commercial purpose, I find myself unable to agree with counsel for plaintiffs in the deduction they draw from their literal interpretation of this Treaty."

The reasoning of Judge Hewitt is logical and, we submit, unanswerable.

Respectfully submitted,

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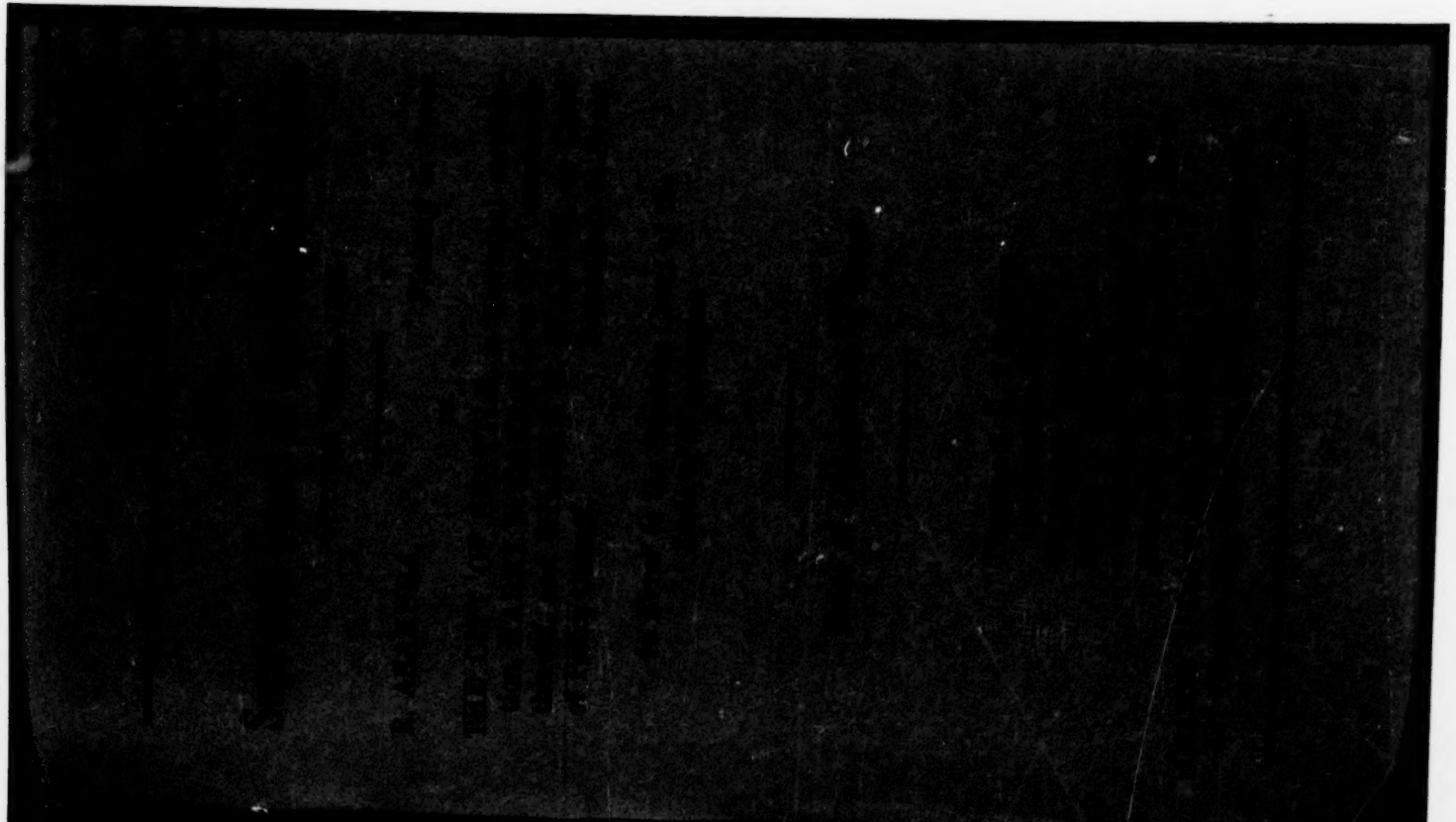

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AUTHORITIES CITIED—(Continued)

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Webb v. O'Brien, Adv. Ops. 1923-24, p. 109, 68 L. ed. —	38, 39, 64
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No. 211

In the

Supreme Court of the United States

OCTOBER TERM, 1923

R. ASAKURA, *Plaintiff in Error*

vs.

THE CITY OF SEATTLE, a municipal corporation, HARRY W. CARROLL, as City Comptroller thereof, and WILLIAM H. SEARING, as Chief of Police thereof, *Defendants in Error*

In Error to the Supreme Court of the State of Washington

Brief of Defendants in Error

STATEMENT

On July 2, 1921, there became effective, Ordinance No. 42323 of the City of Seattle, providing for the licensing and regulation of the occupation of pawnbroking. (Rec. p. 26.) This ordinance was enacted pursuant to the police power of the state as vested in the city. The particular portion of the

ordinance which is attacked in this suit is found in section 6, and reads as follows:

"Provided, however, that no such license shall be granted unless the applicant be a citizen of the United States and a resident of the City of Seattle, or if a corporation, unless the holders of the majority of its capital stock are such citizens. . . . . " (Rec. p. 28.)

On July 12, 1921, the plaintiff in error instituted this action in the Superior Court of the State of Washington for King County, alleging that he was a subject of the Emperor of Japan, lawfully residing in the City of Seattle, and that he had been engaged in business as a pawnbroker in the city for six years. (Rec. pp. 1-6.) He asserted that the provision of the ordinance hereinabove quoted, requiring that all persons who are applicants for a pawnbroker's license shall be citizens of the United States, was in violation of the Fourteenth Amendment to the Federal Constitution and also in violation of the provisions of a certain treaty existing between the United States and Japan proclaimed April 5, 1911.

The plaintiff in error was awarded a temporary injunction by the trial court (Rec. pp. 9-10), which, after a hearing on the merits, was made permanent.

(Rec. pp. 34-35.) The defendants in error thereupon appealed to the Supreme Court of the State of Washington, which on October 24, 1922, reversed the decree of the trial court and directed that the action be dismissed. (Rec. p. 36.)

The decision is reported under the name of *Asakura v. Seattle*, 122 Wash. 81, 210 Pac. 30.

The plaintiff in error thereupon was allowed a writ of error by the chief justice of that court (Rec. p. 43), and the case comes here for review as to the validity of the citizenship requirement of the ordinance under the Fourteenth Amendment and the Japanese Treaty. (Rec. pp. 41-42.)

ARGUMENT

Broadly stated, the question for decision is whether a state, or municipal subdivision thereof, under the police power, may limit to citizens of the United States the privilege of engaging in pawnbroking.

It is the position of the defendants in error that engaging in pawnbroking has uniformly been held to be a privilege and that pawnbroking may be prohibited entirely, or permitted upon such terms as the state may see fit to impose, and that, therefore, the limitation of that occupation to citizens is not forbidden by the Fourteenth Amendment nor in contravention of the Japanese Treaty.

The argument will be presented under seven subdivisions.

I

SCOPE OF CITY'S POLICE POWER

The Ordinance Involved Must Be Treated as a Statute of the State of Washington

Article 11, section 11 of the Constitution of the State of Washington, provides:

"Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

This provision, as construed by the highest court of the state in numerous cases, vests in municipalities the whole police power of the sovereign State of Washington, subject only to the proviso that no ordinance shall conflict with a statute. The following are a few of the decisions so holding:

Smith v. Spokane, 55 Wash. 219, 104 Pac. 249.

Shepard v. Seattle, 59 Wash. 363, 109 Pac. 1067.

Seattle v. Goldsmith, 73 Wash. 54, 131 Pac. 456.

Malette v. Spokane, 77 Wash. 205, 137 Pac. 496.

Detamore v. Hindley, 83 Wash. 322, 145 Pac. 462.

Allen v. Bellingham, 95 Wash. 12, 163 Pac. 18.

Seattle v. Hewetson, 95 Wash. 612, 164 Pac. 234.

State v. Lovelace, 118 Wash. 50, 203 Pac. 28.

In re Sound Transit Co., 119 Wash. 684, 206 Pac. 921.

Linsler v. Booth Undertaking Co., 120 Wash. 177, 206 Pac. 976.

Storey v. Seattle, 124 Wash. 598, 215 Pac. 514.

See, also:

Woods v. Seattle, 270 Fed. 315, 317.

In *Shepard v. Seattle*,* *supra*, this rule is stated as follows:

" . . . . And we might say in this connection that no question is here involved as to the power of the city of Seattle, as contradistinguished from the power of the state itself, for in all matters appertaining to the public health and public safety substantially *the entire police power of the state is vested in municipal corporations* of the first class."

Again, in *Seattle v. Goldsmith*, *supra*, it was said:

*All italics in this brief are ours.

" . . . . *If it be conceded that the state has the power to pass a law of this character, we cannot see how the conclusion can be escaped that cities of the first class have that power.* Under our constitution, article 11, section 10, such cities are permitted to frame their own charters consistent with and subject to the constitution and laws of the state. Section 11 of the same article of the constitution provides:

" 'Any county, city, town or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.'

"These sections delegate the police power of the state to cities of the first class, restricting the exercise of the power to conformity with the constitution and general laws of the state. *If it be admitted then that the passage of this ordinace is within the police power of the state, it must also be admitted that it is within the police power of the city,* unless it can be said to be in conflict with some general law, and no conflict is suggested."

In *Malette v. Spokane, supra,* is found a similar expression:

" . . . . It is the clear intention of the constitution to give to cities of the first class, of which the city of Spokane is one, the largest measure of local self-government compatible with the general authority of the state. Constitution, Art. 11, §10. It can 'make and enforce within its limits all such local, police, sanitary, and other regulations as are not

in conflict with general laws.' Constitution, Art. 11, §11. . . . . *As to matters of local concern, wider powers than those conferred upon cities of the first class by the constitution and laws of this state can hardly be conceived.* It seems plain, therefore, that unless the ordinance in question is contrary to some public policy of the state, either expressed by statute or implied therefrom, it must be held valid."

This constitutional provision was again construed in *Detamore v. Hindley, supra,* in the following language:

" . . . . The one vital question, therefore, is: Has the requisite power been granted to the municipality? The answer must be found in the fundamental and statutory law of this state.

"The state constitution, section 11 of article 11, provides:

" 'Any county, city, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.'

"*This is a direct delegation of the police power as ample within its limits as that possessed by the legislature itself.* It requires no legislative sanction for its exercise so long as the subject-matter is local, and the regulation reasonable and consistent with the general laws."

That the state court still adheres to this doctrine is shown by its recent decision in *Linsler v. Booth Undertaking Co., supra,* where it is said:

" . . . . The ordinance referred to was manifestly passed in the exercise of the police power given to the city by the constitution and the statutes in aid thereof. Section 11, of article 11, of the constitution of this state provides that any city may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. *This is a direct delegation of the police power as amply within its limits as that possessed by the legislature.* So long as the subject-matter is local and the regulations reasonable and consistent with general laws it is not necessary that it be supported by legislative sanction."

This court in *Crowley v. Christensen,* 137 U. S. 86, 34 L. ed. 620, referred to the same provision of the constitution of California (which is word for word identical with that of the Washington constitution), and impliedly recognized this construction of it. In that case it was further pointed out that the decision of the state court was conclusive upon that phase of the case, this court saying:

"The constitution of California vests in the municipality of the city and county of San Francisco the right to make 'all such local, police, sanitary and other regulations as are not in conflict with

general laws.' The Supreme Court of the state has decided that the ordinance in question, under which the petitioner was arrested and is held in custody, was thus authorized and is valid. That decision is binding upon us unless some inhibition of the constitution or of a law of the United States is violated by it. We do not perceive that there is any such violation."

That the legislative body was exercising the police power of the state in passing the ordinance in question, is further shown by the language of section 1:

"This entire ordinance shall be deemed an exercise of the police power of the State of Washington, and of the City of Seattle, for the protection of the public economic and social welfare, health, peace and morals, and all its provisions shall be liberally construed for the accomplishment of that purpose." (Rec. p. 26.)

Therefore, in passing upon the constitutionality of this ordinance, the court must test it by the same rules as are applicable to a statute enacted by the legislature under the police power of the state.

II

PRESUMPTIONS OF VALIDITY

Every Legislative Act is Presumed to Be Constitutional, and If Any State of Facts Can Be Reasonably Conceived to Exist Which Would Sustain the Act, the Court Will Presume Such Facts to Have Existed

No citation of authority is necessary to support the elementary rule of constitutional law that every act of a legislative body is presumed to be within its constitutional powers, unless the invalidity of the act is so apparent as to leave no room for reasonable doubt. In other words, this ordinance must be accorded a *prima facie* presumption of validity.

Furthermore, if any state of facts can reasonably be conceived to have existed which would justify the act, the court must presume that such state of facts did actually exist and that the ordinance was passed for that reason. This rule is well stated in *State v. Pitney*, 79 Wash. 608, 140 Pac. 918 (which was later affirmed by this court in *Pitney v. Washington*, 240 U. S. 387, 60 L. ed. 703), in the following language:

"In determining whether the provisions of a law brings it within the police power, it is not necessary for the court to find that facts exist which would justify such legislation. If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason."

This language was recently approved by the State Supreme Court in *Cornelius v. Seattle*, 123 Wash. 550, 213 Pac. 17.

This court, in one of its early decisions upon the police power of the states, adopted this salutory rule. In *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, it was said:

"For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. *But if it could, we must presume it did.* Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."

Again, in *Sweet v. Rechel*, 159 U. S. 380, 40 L. ed. 188, this court said:

"But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limits of legislative authority, *the existence of the circumstances necessary to support it must be presumed.*"

The same view was expressed in *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 54 L. ed. 515, as follows:

"But whatever the tribunal, in questions of this kind great caution must be used in overruling the decision of the local authorities, or in allowing it to be overruled. No doubt this court has gone a certain distance in that direction. Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Lochner v. New York, 198 U. S. 45, 58, et seq., 49 L. ed. 937, 942, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133. But it has expressed through the mouth of the same judge who delivered the judgment in the case last cited the great reluctance that it feels to interfere with the deliberate decisions of

the highest court of the state whose people are directly concerned. Welch v. Swasey, 214 U. S. 91, 106, 53 L. ed. 923, 930, 29 Sup. Ct. Rep. 567. The reluctance must be redoubled when, as here, the opinion of that court confirms a specific determination concerning the same spot, previously reached by the body that made the law. See French v. Barber Asphalt Paving Co., 181 U. S. 324, 341, 45 L. ed. 879, 888, 21 Sup. Ct. Rep. 625; Smith v. Worcester, 182 Mass. 232, 234, 235, 59 L. R. A. 728, 65 N. E. 40.

"But the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution. If every member of this bench clearly agreed that burying grounds were centers of safety, and thought the board of supervisors and the supreme court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and *if, on the hypothesis that the danger is real, the ordinances would be valid, we should not overthrow it merely because of our adherence to the other belief.*"

In *Mutual Loan Co. v. Martell*, 222 U. S. 225, 56 L. ed. 175, this court upheld as a proper exercise of the police power, a statute making invalid against the employer assignments of wages to be earned in the future unless recorded and accepted in writing by the employer, saying:

"We can not say, therefore, that the statute as a police regulation is arbitrary and unreasonable, and not designed to accomplish a legitimate public purpose. We certainly can not oppose to the legislation our notions of its necessity, and we have expressed 'the propriety of deferring to the tribunals on the spot.'"

More recently, in *Rast v. Van Deman*, 240 U. S. 342, 60 L. ed. 679, this court made a similar holding in regard to a question that was much disputed. It was there said:

"It is established that a distinction in legislation is not arbitrary if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed (citing authorities). It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety (citing authorities)."

See, also:

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 55 L. ed. 369.

In *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, this court held that it would interfere in such cases only when it was clear that the act involved had

no real or substantial relation to the object sought to be attained.

It follows that if the court can reasonably conceive of any circumstances which would justify the action of the city council in limiting pawnbroking in the City of Seattle to citizens of the United States, then the court must indulge in the presumption that those circumstances did exist and that this ordinance was enacted on that account. In this case there can be no question that the ordinance has a substantial tendency to correct the evils existing in the pawnbroking business by limiting those engaged in it to persons attached to the principles of our constitution.

III

MOTIVES OF LEGISLATORS

The Motives of the Legislators in Enacting a Law Will Not Be Inquired Into By the Court

Plaintiff in error offered to prove in the trial court that one city councilman advocated the ordinance in question and worked to obtain its passage for the purpose of preventing Japanese from engaging in pawnbroking in Seattle. (Rec. p. 19.) The trial court properly sustained an objection to the proffered testimony.

It is argued by the plaintiff in error that this ordinance was enacted as a result of race prejudice on the part of its principal advocate in the city council. Even if this were true, the fact would be immaterial. This court early adopted the rule in a similar case that the court can not inquire into the motives of the legislators in voting for an ordinance.

In *Soon Hing v. Crowley*, 113 U. S. 705, 28 L. ed. 1145, in passing upon the validity of an ordinance of San Francisco regulating public laundries, this court said:

"The principal objection, however of the petitioner to the ordinance in question is founded upon

the supposed hostile motives of the supervisors in passing it. The petition alleges that it was adopted owing to a feeling of antipathy and hatred prevailing in the City and County of San Francisco against the subjects of the Emperor of China resident therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation, and residence there, and not for any sanitary, police or other legitimate purpose. There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general with reference to the enactments of all legislative bodies, that the courts can not inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the Acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetratng into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. *And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation*, unless in its

enforcement it is made to operate only against the class mentioned; and of this there is no pretense."

Recently this court had occasion to apply this rule in reference to an act of Congress. In *Hamilton v. Kentucky Distilleries & W. Co.*, 251 U. S. 146, 64 L. ed. 194, the rule was stated as follows:

"No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, inquire into the motives of Congress."

See, also:

McQuillan, Municipal Ordinances, §161, 19 R. C. L. 904.

It may be noted that no proof was offered as to the motives of the other members of the city council (which consists of nine members), in voting upon the passage of this ordinance.

There is, therefore, nothing in the record to show that this ordinance was the result of racial prejudice, and the offer of proof made in that connection was insufficient to prove a fact which was immaterial in any event.

IV

CHARACTER OF THE OCCUPATION OF PAWNBROKING

No Person Has a Vested Right to Engage in Pawnbroking

Having in mind the general principles applicable to this case, which have already been mentioned, we come now to a consideration of the status of pawnbroking under the police power. This occupation has, from earliest times, been held to be one in which no person has a vested right to engage. Because of the facilities that it affords for aiding in and concealing the commission of crime, it has always been regarded by the law as an inherently vicious occupation which may be prohibited entirely. It is not a necessary business and engaging in it is merely a privilege.

Upon this subject the Supreme Court of Missouri, in *St. Joseph v. Levin*, 31 S. W. 101, said:

"The city may not only regulate but suppress pawnbrokers or refuse to license such occupation altogether. No person has the right to follow such occupation within the limits of said city without first obtaining a license from its authorities for that purpose *which may be granted or withheld at*

pleasure. The business is a privilege, not a right, and he who avails himself of it and derives its benefits must bear its burdens and conform to the laws in force regulating the occupation if not illegal."

A leading case upon the subject is that of *Grand Rapids v. Brandy,* (Mich.) 64 N. W. 29, where the court had under consideration an ordinance making it unlawful to engage in pawnbroking without having procured a license, the court saying:

"It is next insisted that the ordinance is so unreasonable that it should be declared void. The charter expressly confers upon the common council the power to license and regulate pawnbrokers, junk dealers, and dealers in second-hand goods. Courts can not interfere with legislative discretion, and are slow to declare ordinances invalid because unreasonable, when the power to legislate upon the subject has been conferred upon the common council. The council's discretion, and not the court's, must control. In such matters the city authorities are usually better judges than the courts. Fisher v. Harrisburg, 2 Grant, Cas. 291; Com. v. Robertson, 5 Cush. 438; St. Louis v. Weber, 44 Mo. 547; 1 Dill. Mun. Corp., section 328. 'Regard must be had to all the circumstances of the particular city, the objects sought to be obtained, and the necessity which exists for the ordinance.' Id. section 327. *It is common knowledge that thieves resort to these places to dispose of their stolen goods, and that unscrupulous, and often times*

criminal, persons are engaged in the business. The business, therefore, comes expressly within the control of the police power of the state, and is properly subject to reasonable rules and regulations. A very clear abuse of this power must be shown in order to justify the court in declaring the regulations to be unreasonable and void. While this business is legitimate in the absence of any statute law controlling it, *no inalienable right exists to carry it on without complying with those provisions and restrictions which the legislative power of the state has seen fit to require.*

* * * * *

"The business is not necessary to the welfare of society or the public. The common council, with the knowledge of all the facts before them to a greater extent than courts can possibly have, have determined that it is well in their judgment, to require these conditions. While the exercise of any arbitrary power may seem harsh, still we are of the opinion that this requirement is not so unreasonable as to require the courts to declare it void."

The Supreme Court of California, in *Levison v. Boas,* 88 Pac. 825, cites the foregoing authorities with approval, saying:

"And first as having to do with the question it is to be noted that the business of a pawnbroker is one which has always been regarded as subject to police regulation for the benefit of the public and to prevent frauds upon it."

The Virginia Supreme Court, in *Elsner Bros. v. Hawkins*, 73 S. E. 479, makes a similar statement as to this occupation:

"The business of pawnbrokers, because of the facility it furnishes for the commission of crime and for its concealment, is one which belongs to a class where the strictest police regulation may be imposed. This is shown by our legislation, both state and local, on the subject and by the adjudications of courts (citing authorities)."

In *Grossman v. Indianapolis*, 88 N. E. (Ind.) 945, an ordinance licensing the business of junk dealer, which occupies a status similar to that of pawnbroking, was reviewed by the Supreme Court of Indiana, which said:

"The right to pursue the business of a junk dealer is not inalienable, but, by the state, may be restricted to any extent deemed proper or wholly denied. In the absence of prohibitory legislation, it is legitimate, and in seeking to prevent waste and conserving old and worn out materials is beneficial; but it is not absolutely essential to the welfare of society. In the case last above cited, in speaking of junk dealers and their places of business, the court said: 'It is common knowledge that thieves resort to these places to dispose of their stolen goods, and that unscrupulous, and oftentimes criminal, persons are engaged in the business.' *The business comes*

clearly within the scope of the police power of the state, and those engaged in it must know that in pursuing such calling they are exercising a personal privilege, rather than an absolute right, without any guaranty or contract express or implied for its definite continuance. The purposes actuating the enactment of provisions regulating such business are the highest that can concern organized society. *The objects, among others, are to prevent both old and young from entering upon a tempting species of petty thievery, to expose dishonest and criminal practices in receiving and concealing stolen property, to assist in reclaiming and restoring such property to the rightful owner, and to facilitate the detection and punishment of thieves.* The state has placed junk dealers under the ban of a license, and has authorized cities still further to tax, license, and regulate their business. The courts are slow to declare any police ordinance invalid as unreasonable, when the power to legislate upon the subject has been expressly conferred upon the common council, and certainly a very clear abuse of power must be shown to justify a court in declaring void provisions so vital to the good of society as those here involved."

The Missouri court in *St. Louis v. Baskowitz*, 201 S. W. (Mo.) 870, in speaking of the business of junk dealers, quoted with approval its decision in *St. Joseph v. Levin, supra*, relative to pawnbrokers, and said in answer to the contention that the ordi-

nance imposed regulations which were practically impossible of being observed:

"This contention is not sound, for the reason heretofore stated, namely, *that the appellant has no inalienable right to conduct a junk shop within the meaning of the constitution, but only has a privilege to so do which may be regulated or absolutely denied under the police power of the state* exercised for the preservation of the lives and property of the people of the city and for the protection of the public health, safety and morals thereof."

The Supreme Court of Washington, in *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735, characterized this business as follows:

"It is not doubted that the business of pawnbroking is a proper subject of police regulation, nor is it doubted that it is within the province of the municipal authorities to make the business bear the costs of such regulation."

The history of pawnbroking, especially in England, shows that the suspicion with which the courts have regarded this occupation is not without foundation. Pawnbroking first came to England at the time of William the Conqueror and still existed there under certain restrictions and disadvantages at the time of the adoption of our constitution. Pawnbrokers were first licensed in 1785,

which was but two years prior to the framing of the constitution. It will therefore be seen that prior to the existence of our present government, pawnbroking, both in England and in her colonies, was regarded as a menace to the public welfare unless conducted under licenses and restrictions. The *Encyclopedia Britannica*, (11th ed.) Vol. 20, at page 973, contains the following statement as to the status of this occupation in England during the 17th and 18th centuries:

"Throughout both the 17th and 18th centuries the general suspicion of the pawnbroker appears to have been only too well founded. It would appear from the references Fielding makes to the subject in Amelia, which was written when George II. was on the throne, that, taken in the mass, he was not a very scrupulous tradesman. Down to about that time it had been customary for publicans to lend money on pledges that their customers might have the means of drinking, but the practice was at last stopped by act of parliament. Nor was respect for the honesty of the business increased by the attempt of 'The Charitable Corporation' to conduct pawnbroking on a large scale. Established by charter in 1707, 'this nefarious corporation' as Smollett called it, was a swindle on a large scale. The directors gambled wildly with the shareholders' money, and in the end the common council of the city of London petitioned parliament for the dissolution of this dishonest concern, on the ground that 'the corporation,

by affording an easy method of raising money upon valuables, furnishes the thief and pickpocket with a better opportunity of selling their stolen goods, and enables an intending bankrupt to dispose of the goods he buys on credit for ready money, to the defrauding of his creditors.' "

The experience of the common council of the city of London, as shown by the foregoing quotation, has a remarkable similarity to the views relative to pawnshops expressed by the courts of this country in the cases hereinbefore cited.

While so far as our investigation discloses, this court has never had occasion to pass upon the status of pawnbroking under the police power, it has discussed the power of the state to prohibit inherently vicious and non-useful occupations.

In *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, the distinction between the retail liquor business and that of operating a laundry (discussed in *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220), is pointed out:

"It will thus be seen that that case was essentially different from the one now under consideration, the ordinance there held invalid vesting uncontrolled discretion in the board of supervisors with reference to a business harmless in itself and useful to the community; and the discretion appearing to

have been exercised for the express purpose of depriving the petitioner of a privilege that was extended to others. *In the present case the business is not one that any person is permitted to carry on without a license but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe.*"

In that decision it was strongly intimated that the municipal authorities might pick and choose between applicants for licenses and grant licenses only when deemed proper.

Later, in *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, this court in speaking of the business of dealing in options to sell grain in the future, said:

"A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils can not be successfully reached unless that calling be actually prohibited, the courts can not interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

In *Murphy v. California*, 225 U. S. 623, 56 L. ed. 1229, an ordinance prohibiting the business of conducting a poolroom was upheld on account of the character of the business. It was there said:

"The 14th Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many nonuseful occupations which may or may not be harmful to the public, according to local conditions, or the manner in which they are conducted."

This court on November 12, 1923, decided the case of *Terrace v. Thompson*, U. S. Adv. Ops. 1923-1924, p. 35, 68 L. ed. —, in which the rights of aliens with respect to the police power of the state were defined as follows:

"The 14th Amendment, as against the arbitrary and capricious or unjustly discriminatory action of the state, protects the owners in their right to lease and dispose of their land for lawful purposes, and the alien resident in his right to earn a living by following ordinary occupations of the community, *but it does not take away from the state those*

powers of police that were reserved at the time of the adoption of the constitution. Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Mugler v. Kansas, 123 U. S. 623, 663, 31 L. ed. 205, 211, 8 Sup. Ct. Rep. 273; Powell v. Pennsylvania, 127 U. S. 678, 683, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; Re Demmler, 136 U. S. 436, 449, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Phillips v. Mobile, 208 U. S. 472, 479, 52 L. ed. 578, 581, 28 Sup. Ct. Rep. 370; Hendrick v. Maryland, 235 U. S. 610, 622, 623, 59 L. ed. 385, 390, 391, 35 Sup. Ct. Rep. 140. And in the exercise of such powers the state has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace, and good order of its people."

The ordinance involved in this case merely restricts the privilege of engaging in this unnecessary and inherently vicious occupation to citizens of the United States. Since, under the authorities cited, the city council could have prohibited the occupation entirely, it can limit its exercise to citizens of the United States without violating the Fourteenth Amendment nor the guarantees contained in the Japanese Treaty.

V

EQUAL PROTECTION OF THE LAWS

Licenses to Engage in Businesses Which Are Privileges May Be Granted to Citizens and Denied to Aliens

Coming now to the question of alleged unlawful discrimination, it has been held in numerous cases, that if the business is one that may be prohibited, alienage may justify the denial of the privilege. Of course a state can not discriminate between aliens and citizens in respect to those useful businesses which every person may follow as of right, as was held in the case of *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, (relied upon by plaintiff in error). However, as we have already seen, pawnbroking is a privilege.

In *People v. Crane*, 108 N. E. (N. Y.) 427, a restriction on the privilege of laboring on public works to citizens of the United States, was upheld and the rule was stated in the following language:

"If the calling is one that the state, in the exercise of its police power, may prohibit either absolutely or conditionally by the exaction of a license, *the fact of alienage may justify a denial of the privilege.* (Citing authorities.)"

That case was affirmed by this court in *Crane v. New York*, 239 U. S. 195, 60 L. ed. 218, with the following comment:

"The contentions of plaintiff in error are based on the treaties and on the 14th Amendment of the Constitution of the United States. The specifications of error are the same, though varying in expression, as those in the *Heim* case, and there considered and declared untenable. *There is added the view that a distinction made between aliens and citizens violates the principle of classification. We think this view is also without foundation.*"

The principal decision was rendered at the same time in the companion case of *Heim v. McCall*, 239 U. S. 175, 60 L. ed. 206.

In Massachusetts a statute providing that no one could become a peddler unless duly licensed and restricting the granting of licenses to citizens was upheld, the court saying:

"There is, however, an important question which was not much discussed in that case, whether the legislature, in the exercise of the police power, could discover a reason for withholding peddlers' licenses from aliens. The business of peddling furnishes such opportunities for the practice of fraud that it is a proper subject for legislative regulation. That such regulation has been practiced from early times, both in Europe and America, is shown at

length by Mr. Justice Gray in Emert v. State of Missouri, 156 U. S. 295, 15 Sup. Ct. 367, 39 L. ed. 430. The requirement of Rev. Laws, c. 65, sec. 19, that before receiving a license the appellant shall file a certificate from the mayor of a city or the majority of the selectmen of a town that to the best of his or their knowledge and belief he is of good repute for morals and integrity, is a reasonable regulation for the protection of the public. If, in the same interest, the legislature deems it important that licenses shall be granted only to citizens of the United States, or to those who have declared their intention to become citizens, it can hardly be said that they have exceeded their constitutional right in passing a law to that effect. Upon a similar question in reference to the granting of licenses to sell intoxicating liquors, decided in Trageser v. Gray, 73 Med. 250, 254, 255, 257, 20 Atl. 905, 906 (9 L. R. A. 780, 25 Am. St. Rep. 587), the court used this language: 'It is thought proper to confine the license to citizens of the United States, of temperate habits and good moral character. The privilege is very liable to be abused, and abuses would produce great public detriment. *It therefore seemed wise to the legislature to confer it only on those who, being natives of the country, may reasonably be supposed to have a regard for its welfare, or who, not being natives, had, as required by the naturalization law, proven by credible testimony before a court of justice that they were attached to the principles of the Constitution of the United States and were well disposed to their good order and happiness.* It was certainly the function of the

lawmaking department to exercise its judgment on this question, and this court has no right to criticise its conclusion."

Commonwealth v. Hana, 81 N. E. (Mass.) 149.

In *Trageser v. Gray*, 20 Atl. (Md.) 905, a statute providing that licenses to sell liquor at retail should be granted only to citizens of the United States was upheld.

The last two cases cited were quoted with approval in *Bloomfield v. State*, 99 N. E. (Ohio), 309, the court saying:

"We do not think the statutes of Ohio and of other states which have barred aliens from the liquor traffic in the manner stated have arisen from a spirit of race hatred or inhospitality, or a purpose to deny the equal protection of our laws or equal opportunity under our institutions. But they are based on the belief that an alien can not be sufficiently acquainted with our institutions and our life to enable him to appreciate the relation of this particular business to our entire social fabric. When he has become more familiar with the spirit of the American people and their laws and has become a citizen, he will easily and readily (in the conduct of the business) assist in the furtherance of the policy of the state."

The wisdom of the views expressed in these decisions and the wisdom of the city council in limiting

pawnbroking to citizens find support in the 1922 report of the Committee on Law Enforcement of the American Bar Association which, after pointing out the large number of crimes of violence committed in this country, says:

"On the other hand, in crimes which indicate the dishonesty of the people, such as larceny, extortion, counterfeiting, forgery, fraud and other crimes of swindling, a comparison of conditions demonstrates that *the morals of this country are better than in any other of the large countries of the world. The American people are an honest people;* commercial integrity here works to a higher standard than in any other land, the morality of the country is higher, the lives of its citizens are cleaner, offenses against women and children are less frequent and more universally abhorred." (Reports of American Bar Association, Vol. XLVII, p. 429.)

In *Morin v. Nunan*, 103 Atl. (N. J.) 378, this rule was applied to the privilege of operating a motor vehicle for hire in the public streets. After distinguishing the case of *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, the court said:

"We think that the operation of vehicles for the transportation of passengers for hire on the public streets of the township is a privilege subject to the control of the township. It is not one of those inalienable rights which belong to human beings, a right to labor for a living."

The Supreme Court of Washington held, in *State v. Ames*, 47 Wash. 328, 92 Pac. 137, that the privilege of piloting ships in the water of the state could be properly limited to citizens.

It is further to be noted that the ordinance in this case does not discriminate between the Japanese and any other class of aliens; it is applicable to all aliens alike. Plaintiff in error complains because not being eligible to naturalization, he can never procure a pawnbroker's license. That, however, is a matter over which the City of Seattle has no control. That he is not considered worthy of citizenship is a complaint addressed, not to the city council, but to the Federal government upon whose treaty he relies. Should Congress see fit to permit Japanese to become citizens, the plaintiff in error would be eligible for a license under the ordinance. However, this court has very recently held that Congress has not yet done so:

> *Ozawa v. United States*, Adv. Ops. 1922-1923, p. 11, 67 L. ed. —.
>
> *Yamashita v. Hinkle*, Adv. Ops. 1922-1923, p. 15, 67 L. ed. —.

That the classification adopted by the city council in the present case does not deny the plaintiff in

error equal protection of the laws is conclusively shown by the recent decision in *Terrace v. Thompson*, U. S. Adv. Ops. 1923-1924, p. 35, 68 L. ed. —, where it was said:

"Eligible aliens are free white persons and persons of African nativity or descent. Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. *The state properly may assume that the considerations upon which Congress made such classification are substantial and reasonable.* Generally speaking, the natives of European countries are eligible. Japanese, Chinese, and Malays are not. Appellants' contention that the state act discriminates arbitrarily against Nakatsuka and other ineligible aliens because of their race and color is without foundation. All persons of whatever color or race who have not declared their intention in good faith to become citizens are prohibited from so owning agricultural lands. Two classes of aliens inevitably result from the Naturalization Laws—those who may and those who may not become citizens. *The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act. We agree with the court below* (274 Fed. 841, 849) that: *'It is obvious that*

one who is not a citizen and can not become one lacks an interest in, and the power to effectually work for the welfare of, the state; and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens.' And we think it is clearly within the power of the state to include nondeclarent eligible aliens and ineligible aliens in the same prohibited class. Reasons supporting discrimination against aliens who may, but who will not, naturalize, are obvious."

In *Frick v. Webb*, U. S. Adv. Ops. 1923-1924, p. 112, 68 L. ed. —, this court upheld a state statute prohibiting ineligible aliens from owning stock in a corporation authorized to own or lease agricultural land. Mr. Justice Butler in delivering the opinion of the court used the following language:

"The state has power, and the act evidences its purpose, to deny to ineligible aliens permission to own, lease, use or have the benefit of lands within its borders, for agricultural purposes. Webb v. O'Brien, supra. 'As the state has the power . . . . to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective.' Crane v. Campbell, 245 U. S. 304, 307, 62 L. ed. 304, 309, 38 Sup. Ct. Rep. 98, and cases cited; Hebe Co. v. Shaw, 248 U. S.

297, 303, 63 L. ed. 255, 258, 39 Sup. Ct. Rep. 125. It may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens. The right 'to carry on trade' given by the treaty does not give the privilege to acquire the stock above described. To read the treaty to permit ineligible aliens to acquire such stock would be inconsistent with the intention and purpose of the parties. We hold that the provisions of section 3, above referred to, does not conflict with the 14th Amendment or with the treaty."

See, also, *Webb v. O'Brien*, U. S. Adv. Ops. 1923-1924, p. 109, 68 L. ed. —, which distinguishes *Truax v. Raich*, 238 U. S. 33, 60 L. ed. 131, from such a case as the one at bar.

The basis of classification between aliens and citizens being a proper one, the ordinance is not invalid because Congress has so far failed to make Japanese subject to naturalization.

Furthermore, the burden of showing that the classification complained of does not rest upon any reasonable basis, is upon the plaintiff in error.

In *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 55 L. ed. 369, this court stated the rule as follows:

"The rules by which this contention must be tested, as is shown by repeated decisions of this

court, are these: 1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. *One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.*"

In order to constitute an unlawful discrimination, it must be shown that there could be no reasonable connection between excluding aliens from engaging in the business of pawnbroking, and the end sought to be attained, namely, the proper regulation of this occupation which is recognized by the courts as being so detrimental to the public welfare. The legislators had a right to presume that pawnbroking would be conducted by citizens with less harm to the public welfare than when conducted by aliens. In any event, this court can not substitute its judg-

ment upon this question for that of the legislative body. This rule has been many times announced by this court.

In the recent case of *Crescent Cotton Oil Co. v. Mississippi*, 257 U. S. 129, 66 L. ed. 166, is found the following expression:

"This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the state in the exercise of its police power to prevent a practice conceived to be promotive of monopoly, with its attendant evils. It is clearly settled that any classification adopted by a state in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the laws clause of the 14th Amendment, *and also that every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed.*"

In *Heisler v. Thomas Colliery Co.*, Adv. Ops. 1922-1923, p. 119, the rule is again stated in the following language:

"In other cases it is said that facts which can be reasonably conceived of as having existed when the law was enacted will be assumed to justify it. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337,

Ann. Cas. 1912C, 160; Crescent Oil Co. v. Mississippi, 257 U. S. 129, 137, 66 L. ed. 166, 42 Sup. Ct. Rep. 42. And 'it makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.' Rast v. Van Deman & L. Co., 240 U. S. 342, 357, 60 L. ed. 679, 687, L. R. A. 1917A, 421, 36 Sup. Ct. Rep. 370, and cases there cited. *And, further, the purpose of the legislation may not be the correction of some definite evil, but may be only to remove 'obstacles to a greater public welfare.'*

"See, also, as to classification by legislation and its consonance to the requirements of the 14th Amendment, District of Columbia v. Brooke, 214 U. S. 138, 150, 53 L. ed. 941, 945, 29 Sup. Ct. Rep. 560."

See, also:

Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188.

Home Telephone & Telegraph Co. v. Los Angeles, 211 U. S. 264, 53 L. ed. 176.

Rast v. Van Deman, 240 U. S. 342, 60 L. ed. 679.

We refer in passing to the case of *State v. Ware*, 154 Pac. (Ore.) 905, in which a statute forbidding non-residents to loan money at a rate of interest

greater than 10 per cent and permitting residents to do so, was upheld.

From what has been said, it will be observed that there is no unlawful discrimination in the ordinance in question, and that it does not deny the plaintiff in error equal protection of the law, contrary to the provisions of the Fourteenth Amendment.

VI

SCOPE OF THE TREATY-MAKING POWER

The Federal Government Through the Treaty-Making Power Cannot Restrict the Police Power of a Sovereign State

Before considering the provisions of the Japanese Treaty applicable to this case, it is proper to consider the scope of the treaty-making power. In one of the most recent cases upon this subject, *Missouri v. Holland*, 252 U. S. 416, 64 L. ed. 641, this court said:

"It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way."

If it be the meaning of the decision in that case that the treaty-making power is not limited by the other provisions of the constitution, then our argument upon this branch of the case is in opposition to that decision. However, we think it is open to question, whether a majority of this court intended to so hold in that case.

So far as our investigation disclosed, the only opinion of a member of this court which squarely passes upon the relation between the treaty-making power of the Federal government and the police power of the states, is that of Mr. Justice Daniel, in the *License* cases, 5 How. 505, 12 L. ed. 256. The learned justice there concurred in the conclusion reached by his associates, but based his opinion upon a different ground. Upon the subject now under discussion, he said:

"By the 6th article and 2d clause of the constitution it is thus declared: 'That this constitution and the laws of the United States made in pursuance thereof, and treaties made under the authority of the United States, shall be the supreme law of the land.'

"This provision of the constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the federal government must be expounded in coincidence with a perfect right in the states to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded

to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the constitution. *Treaties, to be valid, must be made within the scope of the same powers; for there can be no 'authority of the United States,' save what is derived mediately or immediately, and regularly and legitimately, from the constitution.* A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a state or of any citizen of a state."

Mr. Chief Justice Taney in his dissenting opinion in the *Passenger* cases, 7 How. 283, 12 L. ed. 702, expressed a similar view, and Mr. Justice Daniel in that case approvingly quoted the above portion of his former opinion. Although these last referred to opinions were minority opinions, that of a majority does not seem to disagree with them upon this point.

Another expression of this court to the effect that the treaty-making power is limited by the other provisions of the constitution and by the peculiar nature of our form of government, is found in *De Geofroy v. Riggs*, 133 U. S. 267, 33 L. ed. 642, and is as follows:

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other na-

tions, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the constitution, is in terms unlimited *except by those restraints which are found in that instrument against the action of the government or of its departments and those arising from the nature of the government itself and of that of the states.* It would not be contended that it extends so far as to authorize what the constitution forbids or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent."

Mr. Justice White rendered a special concurring opinion in *Downes v. Bidwell*, 188 U. S. 244, 45 L. ed. 1088, which had the approval of Justices Shiras and McKenna. The opinion points out that the treaty-making power must be interpreted with

reference to the nature of our government and in harmony with related provisions of the constitution. In the course of this opinion, it was said:

"Let me come, however, to a consideration of the express powers which are conferred by the constitution, to show how unwarranted is the principle of immediate incorporation, which is here so strenuously insisted on. In doing so it is conceded at once that the true rule of construction is not to consider one provision of the constitution alone, but to contemplate all, and therefore to limit one conceded attribute by those qualifications which naturally result from the other powers granted by that instrument, so that the whole may be interpreted by the spirit which vivifies, and not by the letter which killeth. Undoubtedly, the power to carry on war and to make treaties implies also the exercise of those incidents which ordinarily inhere in them. Indeed, in view of the rule of construction which I have just conceded—that all powers conferred by the constitution must be interpreted with reference to the nature of the government and be construed in harmony with related provisions of the constitution—it seems to me impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the express or implied approval of Congress. And from this it must follow that there can be no foundation for the assertion that, where the treaty-making power has inserted conditions which preclude incorporation until Congress has acted in respect thereto, such conditions are void

and incorporation results in spite thereof. *If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the constitution with the most unlimited right, susceptible of destroying every other provision of the constitution; that is, it may wreck our institutions.* If the proposition be true, then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the government be overthrown. While thus aggrandizing the treaty-making power on the one hand, the construction at the same time minimizes it on the other, in that it strips that authority of any right to acquire territory upon any condition which would guard the people of the United States from the evil of immediate incorporation. The treaty-making power, then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted,—vested with the right to destroy upon the one hand, and deprived of all power to protect the government on the other."

In *Compagnie Francaise v. State Board of Health*, 25 So. (La.) 591, the Supreme Court of Louisiana in upholding a state quarantine law as against certain treaties said:

"The treaties and laws of the United States must be held to have been passed with reference to, and subsidiary to, the rightful exercise of the police power by the different states in aid of the protection and preservation of the public health within their respective borders."

This decision was affirmed by this court in 186 U. S. 580, 46 L. ed. 1209, it being intimated that a treaty could not operate so as to invalidate a state quarantine law. The pertinent portion of this court's opinion is as follows:

"Conceding, arguendo, this latter proposition, and therefore assuming that all the treaties relied on are applicable, we think it clearly results from their context that they were not intended to, and did not, deprive the government of the United States of those powers necessarily inhering in it and essential to the health and safety of its people. We say the United States, because if the treaties relied on have the effect claimed for them that effect would be equally as operative and conclusive against a quarantine established by the government of the United States as it would be against a state quarantine operating upon and affecting foreign commerce by virtue of the inaction of Congress."

Justice Sawyer, in *In re Wong Young Quy*, 2 Fed. 624, expressed doubt as to whether the treaty-making power could abridge the police power of the state, saying:

"Besides, it may well be questioned whether the treaty-making power would extend to the protection of practices, under the guise of religious sentiment, deleterious to the public health or morals, *or to a subject-matter within the acknowledged police power of the state.*"

A similar view was expressed in *Cantini v. Tillman*, 54 Fed. 969, in the following language:

"We have seen that the right to sell intoxicating liquors is not a right inherent in a citizen, and is not one of the privileges of American citizenship; that it is not within the protection of the fourteenth amendment; that it is within the police power. *The police power is a right reserved by the states, and has not been delegated to the general government. In its lawful exercise, the states are absolutely sovereign. Such exercise can not be affected by any treaty stipulations. 'Salus populi suprema lex.'*"

The Supreme Courts of California and New Hampshire expressed themselves in no uncertain terms upon this question.

In *People v. Naglee*, 1 Cal. 232, the contention was advanced that a state statute requiring foreigners to pay a license to operate a mine violated rights guaranteed by a certain treaty. The court dealt with this contention as follows:

"But even if the provisions of the statute did clash with the stipulations of that, or of any other

treaty, the conclusion is not deducible that the treaty must, therefore, stand, and the state law give way. The question in such case would not be solely what is provided for by the treaty, but whether the state retained the power to enact the contested law, or had given up that power to the general government. If the state retains the power then the president and senate can not take it away by treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, it can not supersede a state law which enforces or exercises any power of the state not granted away by the constitution. To hold any other doctrine than this would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective states, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the states to a foreign nation."

The same court in the later case of *Siemssen v. Bofer*, 6 Cal. 250, speaking through Chief Justice Murray, said:

"Where, let it be asked, is the exercise of this power to end, and who is to be the judge whether

the objects intended to be compassed are strictly within the treaty making power? Already have we witnessed in this state, one disgraceful exhibition of the extent to which the power may be claimed; and the right of a party to be confronted with his witnesses, and have process for their attendance in court, a right guaranteed by the constitution and laws of the United States, and the State of California, is claimed to have been abrogated by treaty stipulations with France.

"It can not be contended, with any show of reason, that the Federal Government took this grant of power in the enlarged sense in which it is exercised by England, and the nations on the continent of Europe; or that she is vested with the same plenary powers that the individual states were before the adoption of the constitution.

"The political structure of our government forbids such an idea. The power must be construed in reference to the powers delegated to the United States, and those reserved to the states, and must be further limited to objects which are the peculiar and proper subject matter of treaty stipulation.

"The exercise of this power under the constitution, can scarcely extend beyond that of declaring war, making peace, regulating commerce, and adjusting national misunderstandings or differences; and for the execution of such purposes, the power to alter the rules of descent, to change the domestic policy of a state, and to alter the laws of evidence are not incidents, any more than the right to abol-

ish slavery, or any of the otner acts we have enumerated."

The same opinion was expressed in *Pierce v. State*, 13 N. H. 536, it being there said:

"Thus the general power to make treaties, confers authority to negotiate compacts relative to the proper subject-matters of treaty stipulation, such as peace, war, commercial intercourse, alliances, etc. A treaty has been defined to be 'a compact of accommodation relating to public affairs,' but the political rights of the people of the several states, as such, are not subjects of treaty stipulation. It needs no argument to prove that an attempt on the part of the United States, by compact with a foreign government, to qualify the right of suffrage in a state, prescribe the time and mode of elections, or to restrain the power of taxation under state authority, would transcend the limits of the treaty-making power, and be entirely void; and an agreement with a foreign government, prescribing the terms on which highways should be laid out in the states, regulating the support of paupers, or the sale of goods by auctioneers, or by hawkers and peddlers, would be of the same character. The police of the several states, regarded as separate governments, is not a subject-matter to which the treaty-making power extends."

It seems to us that the framers of the constitution intended that the treaty-making power, which was vested in the President and the Senate, should

be exercised subject to the limits imposed by that instrument. If Congress and the President can not enact a statute which violates the 10th Amendment, how can the President and the Senate, together with some alien minister or other diplomatic representative, enter into a treaty which has that effect? The decision in *Missouri v. Holland, supra*, intimates that such is the case, but even if the broad statement referred to be correct, the facts of that case are distinguishable from the present case in that the subject-matter was not local and internal.

The 10th Amendment declares that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." As was said by Mr. Justice Brewer in *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956:

"The powers affecting the internal affairs of the states not granted to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the constitution are reserved to the people of the United States. The people who adopted the constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the cir-

cumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. *This article 10 is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning.*"

One of the powers reserved to the state (which is to be liberally construed), is the police power, pursuant to which a state may prohibit callings dangerous to the public. If, as the authorities heretofore cited hold, the state in such cases may restrict those engaged in such callings, to citizens, then the President, Senate, and the representative of a foreign government can not thus limit the police power of the state by entering into a treaty. A treaty made within the scope of the treaty-making power is declared by the constitution to be the supreme law of the land, but when it transcends the purpose for which that power was delegated to the national government, it is to that extent void.

If the treaty-making power should be declared to be not limited by the other provisions of the constitution, then it becomes a convenient substitute

for congressional legislation in fields over which Congress has no jurisdiction. As this court knows, a treaty is usually drafted secretly by the state department or commissioners appointed by the President, in conference with some foreign representative. After it is agreed upon by the diplomats it is sent to the President, who, if satisfied with it, transmits it to the Senate. There it is generally considered at a secret session. If ratified by the Senate it is then proclaimed by the President and the people are at that time, after the obligations provided in it have been assumed by the United States, for the first time permitted to know its contents.

By referring to these practical considerations, we do not mean to argue that the possible abuse of a power is an argument against its existence, but we think that these considerations are very pertinent in determining the intent of the people in adopting the 10th Amendment. If a treaty can take a way part, or all, of the police power of the state, then the 10th Amendment is of no avail and the safeguard which the people put upon their right to govern themselves in matters of local concern is nugatory.

It has always been the policy of this court to preserve our dual form of government in the same form in which it was originally created by the people, and this court has always restrained attempts on the part of either the Federal Government or the states to encroach upon or impair the powers of the other.

In the *Slaughter House Cases*, 83 U. S. 36, 21 L. ed. 394, it was held that Congress had no power to legislate directly in regard to local affairs of the states by virtue of the adoption of the 14th Amendment. Recently this court has held that the Federal Government can not exercise its power to regulate commerce for the purpose of controlling matters of state concern (*Hammer v. Dagenhart*, 247 U. S. 251, 62 L. ed. 1101); and more recently has held that the power of internal revenue taxation can not be misused for that purpose (*Bailey v. Drexel Furniture Co.* 259 U. S. 20, 66 L. ed. 817). The only remaining means for the Federal Government to impair the police power of the states is by treaty. Will this court now hold that the treaty-making power is unlimited by the 10th Amendment?

The closing words of Mr. Justice Miller in rendering the opinion of the court in the *Slaughter*

House Cases, 83 U. S. 36, 21 L. ed. 394, concerning the relation between our state and Federal Governments still proclaim the policy of this court upon this subject. He said:

"But, whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held, with a steady and an even hand, the balance between the state and federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the constitution, or any of its parts."

VII

CONSTRUCTION OF THE JAPANESE TREATY

The Japanese Treaty Does Not Guarantee the Privilege of Engaging in Pawnbroking

In advancing our seventh and last branch of the argument, we will assume for argument's sake, that the Federal Government can by making a treaty impair or limit the state's police power. Nevertheless, the treaty involved in this case can not reasonably be construed as guaranteeing to the plaintiff in error the privilege of pursuing a calling which may not be entered as of right.

It is to be noted in passing, that the Japanese treaty does not contain a "most favored nation" clause, except as to commerce and navigation.

The portion of the treaty between the United States and the Empire of Japan, proclaimed April 5, 1911, which is chiefly relied upon, reads as follows:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other, *to carry on trade, wholesale and retail,* to own or lease and occupy houses, manufacturies, warehouses and

shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established." 37 Stat. at L. 1504.

The term "trade" as used in the treaty, means dealing in commodities as a buyer or seller, but can not reasonably be held to include the indiscriminate loaning of money upon pledge of personal effects.

The word "trade" has been several times judicially so defined:

May v. Sloan, 101 U. S. 231, 25 L. ed. 797.
State v. Krech, 10 Wash. 166, 38 Pac. 1001.

Bouvier's Law Dictionary, (8th ed.), defines trade as, "any sort of dealings by way of *sale or exchange;* commerce, traffic."

Webster's International Dictionary, gives among others, the following definition:

"Act or business of exchanging commodities by barter, or by buying and selling for money; commerce; traffic. *Trade*, in this sense, comprehends every species of exchange or dealing, either in the produce of land, in manufactures, in bills, or in money; but it is chiefly used to denote the barter or purchase and sale of goods, wares, and merchandise, either by wholesale or retail."

The *Encyclopedia Brittannica*, (11th ed.) volumn 27, at page 127, defines the term as follows:

"*Trade* (O. Eng. trod, footstep, from *tredan*, to tread; in M. Eng. the forms *tred*, *trod* and *trade* appears, the last in the sense of a beaten track), originally a term meaning track or course, and so surviving in 'trade-wind' (q. v.), a wind which always blows in one course; hence a way of life, business or occupation, and, specifically, the handicraft in which a man has been trained and which he makes his means of livelihood, or the mercantile business which he carries on for profit, as opposed to the liberal arts or professions. A further development of meaning makes the word synonymous with commerce, comprehending every species of exchange or dealing in commodities."

Speaking of the scope and purpose of the Japanese Treaty involved in this case, this court recently said in *Terrace v. Thompson*, U. S. Adv. Ops. 1923-1924, page 35:

"The state act, in our opinion, is not in conflict with the treaty between the United States and Japan. The preamble declares it to be 'a treaty of commerce and navigation,' and indicates that *it was entered into for the purpose of establishing the rules to govern commercial intercourse between the countries.*

". . . . . The right to 'carry on trade,' or 'to own or lease and occupy houses, manufactories, ware-

houses, and shops,' or 'to lease land for residential and commercial purposes,' or 'to do anything incident to or necessary for trade,' can not be said to include the right to own or lease, or to have any title to or interest in, land for agricultural purposes. *The enumeration of rights to own or lease for other specified purposes impliedly negatives the right to own or lease land for these purposes.* A careful reading of the treaty suffices, in our opinion, to negative the claim asserted by appellants that it conflicts with the state act."

The plaintiff in error in his brief quotes at length from a memorandum decision of a superior court judge of Los Angeles County in the unreported case of *State v. Tagami.* In that decision the court of first instance concludes that the leasing of land by a Japanese for the purpose of conducting a health resort and sanatorium is a "residential and commercial purpose" within the meaning of the Japanese treaty. The case did not call for an interpretation of the phrase "to carry on trade" which is here involved. Furthermore, an appeal has been taken to the Supreme Court of California where the liberal views of the *nisi prius* court may be modified by the adoption of a common sense interpretation of the treaty. However that may be, this court has already placed its own interpretation on this treaty, holding that its purpose was to gov-

ern commercial intercourse with Japan. (*Terrace v. Thompson, supra.*)

See also:

Frick v. Webb, U. S. Adv. Ops. 1923-24, p. 112, 68 L. ed. —.

Webb v. O'Brien, U. S. Adv. Ops. 1923-24, p. 109, 68 L. ed. —.

It would surely do violence to the intention of the signatories to this treaty to hold that they intended, by the use of this term, to secure to the plaintiff in error the privilege of conducting a pawnshop in the United States. While treaties must be construed liberally to make effective the intention of the parties, yet a strained construction such as suggested by plaintiff in error should not be indulged in. We submit that pawnbroking was not intended to be included in the word "trade" as used in the treaty, and that it can not properly be said to be incidental to trade. We agree with plaintiff in error that the word "trade" is used in the ordinary acceptation of the term, but we challenge him to cite an instance where the word "trade" was ever used to describe the act of pawning or the term "tradesman" to designate a pawnbroker.

There is a further reason why the treaty does not apply to the case at bar. This is aptly illustrated in at least two decisions of this court. It has already been demonstrated that pawnbroking is a privilege. This being so, the provisions of the treaty are inapplicable.

In *Patsone v. Pennsylvania*, 232 U. S. 138, 58 L. ed. 539, it was contended that an act of the State of Pennsylvania forbidding a foreign-born person to shoot wild game, and to that end prohibiting such person from owning or being in possession of a shotgun or rifle, was in violation of a treaty with Italy containing language similar to our treaty with Japan.

The act was upheld because the thing prohibited was a privilege and therefore not guaranteed by the treaty. Mr. Justice Holmes, in delivering the opinion of the court, said:

"The defense under the treaty with Italy of February 26, 1871, (17 Stat, at L. 845), appears to us to present less difficulty. The provisions relied upon are those in article 2, giving to citizens of Italy the right to carry on trade and to do anything incident to it upon the same terms as the natives of this country; in article 3, assuring them security for persons and property, and that they 'shall enjoy

in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives;' and in article 24, promising to the Kingdom of Italy the same favors in respect to commerce and navigation that may be granted to other nations. We will say a word about each.

"The last article is supposed to make applicable a convention with Switzerland providing against more burdensome conditions being imposed upon the residence of Swiss than upon that of citizens. But article 24 refers only to commerce and navigation, and the case must stand wholly upon articles 2 and 3. As to article 2, it will be time enough to consider whether the statute can be construed or upheld as precluding Italians from possessing a stock of guns for purposes of trade when such a case is presented. The act was passed for an object with which possession in the way of trade has nothing to do, and well might be interpreted as not extending to it. There remains, then, only article 3. With regard to that it was pointed out below that the equality of rights that it assures is equality only in respect of protection and security for persons and property. The prohibition of a particular kind of destruction and of acquiring property in instruments intended for that purpose establishes no inequality in either respect. *It is to be remembered that the subject of this whole discussion is wild game, which the state may preserve for its own citizens if it pleases.* Geer v. Connecticut, 161 U. S. 519, 529, 40 L. ed. 793, 797, 16 Sup. Ct. Rep.

600. *We see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the states to the full extent.* Campagnie Francaise de Navigation a Vapeur v. State Board of Health, 186 U. S. 380, 394, 46 L. ed. 1209, 1216, 1217, 22 Sup. Ct. Rep. 811."

Again in *Heim v. McCall*, 239 U. S. 175, 60 L. ed. 206, a similar conclusion was reached. This court in that case had under consideration a statute of the State of New York providing that in the construction of public works only citizens of the United States should be employed. It was contended that this act was in violation of the treaty with Italy, which was discussed in the case last cited. After holding that to labor upon public works was a privilege and not a right, the opinion says:

"Construing the provision of 1871, the court of appeals decided that it 'does not limit the power of the state, as a proprietor, to control the construction of its own works and the distribution of its own moneys.' The conclusion is inevitable, we think, from the principles we have announced. We need not follow counsel in dissertation upon the treaty-making power or the obligation of treaties when made. The present case is concerned with construction, not power; and we have precedents to guide construction. The treaty with Italy was considered in Patsone v. Pennsylvania, 232 U. S. 138, 145, 58 L. ed. 539, 544, 34 Sup. Ct. Rep. 281, and a

convention with Switzerland (as in the present case) which was supposed to become a part of it. It was held that a law of Pennsylvania making it unlawful for unnaturalized foreign-born residents to kill game, and to that end making the possession of shotguns and rifles unlawful, did not violate the treaty. Adopting the declaration of the court below, it was said 'that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property.' And the ruling was given point by a citation of the power of the state over its wild game, which might be preserved for its own citizens. *In other words, the ruling was given point by the special power of the state over the subject-matter,—a power which exists in the case at bar, as we have seen.*"

See also:

Bondi v. Mackay, 89 Atl. (Vt.) 228, 231.

If (as the decisions hereinbefore cited hold) engaging in pownbroking is a privilege, and not a right, then, under the two decisions of this court, just referred to, the language of the Japanese Treaty has no application. Article 1 of the treaty upon which reliance is principally placed, merely guarantees to a subject of Japan lawfully residing in this country, the right to carry on trade upon the same terms as our own citizens. If, as this court has held, such language in a treaty does not include

the privilege of shooting wild game, or laboring on public work, then by no reasonable construction can this treaty be held to guarantee to the plaintiff in error the privilege of engaging in pawnbroking.

CONCLUSION

From the foregoing authorities it will be seen that there is nothing in the ordinance complained of which is violative of the Fourteenth Amendment or the Japanese Treaty.

Viewing the ordinance as though it were a statute enacted by the State of Washington by virtue of its police power, the plaintiff in error has not met the burden of overcoming the presumption as to its validity. The occupation involved has been properly classified by the courts as a privilege, and this fact justifies the legislative authority in limiting its exercise to citizens of the United States. There is nothing in the Fourteenth Amendment which forbids this.

Regardless of whether the Federal Government can impair a state's police power by means of a treaty, no reasonable construction of the treaty here invoked would warrant the holding that the privilege of pawnbroking was intended to be included in its scope.

We submit that there is no error in the judgment rendered herein by the Supreme Court of the State of Washington and that it should be affirmed.

Respectfully submitted,

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